Supreme Court, U.S.
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No. 06-1045

In The
Supreme Court of the United States

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether granting standing to litigate a Dormant Commerce Clause claim to a party not impacted by the provisions of a state enactment inappropriately diminishes or eliminates the standing requirements articulated by decisions of this Court?

2. Is the Dormant Commerce Clause violated by Article XII, Section 8 of the Nebraska Constitution which applies equally to all corporations conducting business in Nebraska and has only incidental effects on interstate commerce?

3. When the highest court of a state has recognized the concept of severability in state enactments, is it appropriate for a federal court to overturn an entire state enactment when only a severable portion of that enactment has been found to violate our federal constitution?

4. When facts are in dispute and a Circuit Court must weigh evidence presented by the parties, is summary judgment appropriate under the standards articulated by this Court?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

> Petitioners, who were the Appellants in the appeals court, are Secretary of State John Gale, in his official capacity, and Attorney General Jon Bruning, in his official capacity. Respondents, who were the Appellees in the appeals court are Jim Jones, Terrence M. Shumacher, Shad Dahlgren, Todd Ehler and Robert E. Beck III.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners or Respondents to this case is a corporation or other syndicate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eight Circuit Court of Appeals is reported at 470 F.3d 1261 (8th Cir. 2006). (App. 1-18). The opinion of the United States District Court, District of Nebraska is reported at 405 F.Supp.2d 1066 (D.Neb. 2005). (App. 19-58).

JURISDICTION

The Eighth Circuit Court of Appeals entered its opinion and judgment on December 13, 2006. (App. 1-18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

> The Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . . "

U.S.C.A. Const. Art. I § 8, cl. 3.

> No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used

> for farming or ranching in this state, or engage in farming or ranching. . . . These restrictions shall not apply to (A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch. . . .

Neb. Const. Art. XII, § 8. The full text of Initiative 300 is set forth *infra*, App. 59-63.

STATEMENT OF THE CASE

The State Enactment

Article XII, Section 8 of the Nebraska Constitution (hereinafter "Initiative 300") originated as a constitutional amendment proposed through the initiative petition process and appeared as a ballot question on the 1982 general election ballot. (Complaint of Jim Jones, Terrence M. Shumacher, Shad Dahlgren, Todd Ehler and Robert E. Beck III, ¶ 14; App. 67, ¶ 14). A ballot title and explanatory statement was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. (App. 67-68, ¶¶ 15, 18).

As defined by law, the purpose of the ballot title was to express the purpose of the measure in up to one hundred words. (App. 67, ¶ 16). The ballot title submitted to

Nebraska voters with regard to Initiative 300, in part, stated as follows: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" (App. 67-68, ¶ 17).

The purpose of the explanatory statement is to explain the effect of a vote for and against a measure. (App. 68, ¶ 19). The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." (App. 68, ¶ 20).

The Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. (App. 68, ¶ 21). Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed. (App. 68, ¶ 22). Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution upon the issuance of a proclamation by the Governor on November 29, 1982. (App. 69, ¶ 25).

The Parties

Respondents, who are private individuals owning various interests in Nebraska farm and ranch land and livestock operations, brought suit alleging that Initiative

300 violates the Commerce Clause, 42 U.S.C. § 1983, and the ADA. (App. 73-80, ¶¶ 40-86). Respondents named as defendants Nebraska's Secretary of State and Attorney General in their official capacities. (App. 64). Respondents sought a declaration that Initiative 300 was unconstitutional and an injunction prohibiting its enforcement. (App. 81).

Respondent Terrence M. Schumacher ("Schumacher") is a resident of Boulder, Colorado who has an ownership interest in Nebraska farmland and would like to form a limited partnership and transfer the land to this entity. (App. 65, 71, ¶¶ 5, 32). Schumacher alleges that neither he nor any other members of his family reside on the Nebraska farmland and Schumacher, *himself*, is not engaged in the day to day labor and management of the farmland. (App. 71, ¶¶ 32-33).

Respondent Robert E. Beck III ("Beck") resides near Kearney, Nebraska and owns a commercial cattle feeding operation. (App. 66, 72-73, ¶¶ 9, 37). Beck alleges that Initiative 300 prohibits him from "conducting business with potential customers in other states who own cattle under a corporate entity or other 'syndicate' ". (App. 72-73, ¶ 37).

Petitioner John Gale is the Secretary of State of the State of Nebraska and is charged with the duty, in his official capacity, to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations." Neb. Const. Art. XII, Sec. 8. (App. 63). Petitioner Jon Bruning is the Attorney General of the State of Nebraska and has the responsibility, in his official capacity, to "commence an action in

District Court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of [Art. XII, Sec. 8]" if the Attorney General has reason to believe that a corporation or syndicate is violating Initiative 300. Neb. Const. Art. XII, Sec. 8. (App. 63).

The Litigation Below

On December 15, 2005, the United States District Court for the District of Nebraska (hereinafter "District Court") partially granted Respondents' Motion for Summary Judgment as to Respondents' claims that Initiative 300 violated the Commerce Clause, 42 U.S.C. § 1983 and the ADA. (App. 57-58). Petitioners filed their Petition for Permission to Appeal the District Court's order pursuant to 28 U.S.C.A. § 1292(b) on December 23, 2005 and the Eighth Circuit Court of Appeals (hereinafter "Eighth Circuit" or "Circuit Court") granted Petitioners' Petition for Permission to Appeal on January 24, 2006.

On December 13, 2006, a panel of the Eighth Circuit affirmed the District Court ruling that Respondents had standing to bring their Commerce Clause claims, Initiative 300 violates the dormant commerce clause, and the portion of Initiative 300 found to be unconstitutional could not be severed from the remainder of the constitutional amendment. *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). (App. 1-18). The Eighth Circuit did not reach a conclusion as to whether Initiative 300 violates the Americans with Disabilities Act. *Jones*, 470 F.3d at 1271. (App. 18).

REASONS FOR GRANTING THE PETITION

QUESTION #1

Whether granting standing to litigate a Dormant Commerce Clause claim to a party not impacted by the provisions of a state enactment inappropriately diminishes or eliminates the standing requirements articulated by decisions of this Court?

Before reaching the merits of a case, it is incumbent upon a court to determine whether the Respondents have "suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). In this instance, the Circuit Court determined that Respondents Schumacher and Beck had standing to bring their Commerce Clause claims even though the prohibitions of Initiative 300 did not apply to them. *Jones* 470 F.3d at 1267. (App. 9). In so holding, the Circuit Court has, for all intents and purposes, eliminated the standing requirement for a Dormant Commerce Clause claim. That holding is contrary to the standard articulated by this Court for determining whether a party has standing to bring a Commerce Clause claim.

A. Respondents Have Not Suffered an Injury in Fact Which Would Give Them Standing Under Article III of the United States Constitution.

Respondents, as private individuals, are not specifically limited by the prohibitions of Initiative 300 and therefore have not suffered an injury in fact which would

entitle them to bring suit in the present instance. This Court has held that,

> [d]etermining that a matter before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects "the proper-and properly limited-role of the courts in a democratic society," *Allen v. Wright,* 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (quoting *Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.

DaimlerChrysler Corp. v. Cuno, ___ U.S. ___, 126 S. Ct. 1854, 1860-1861, 164 L. Ed. 2d 589 (2006).

This Court has gone on to recognize that the limitations of Article III standing are essential

> in maintaining the 'tripartite allocation of power' set forth in the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (quoting *Flast v. Cohen,* 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)). If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments

> would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed.1984).

DaimlerChrysler Corp., 126 S. Ct. at 1861.

In the present case, the Circuit Court found that Respondents Schumacher and Beck had standing to bring their claims. *Jones*, 470 F.3d at 1267. (App. 9). However, the Circuit Court's finding that Respondents suffered an injury in fact ignores the requirement set forth by this Court that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp.*, 126 S. Ct. at 1861 (quoting *Allen,* 468 U.S. at 751, 104 S. Ct. at 3315). To allow Respondents to bring their claims in this case, would be to diminish the requirements for standing under the Commerce Clause so significantly as to allow anyone claiming an intent or a desire to engage in a particular conduct to have Article III Standing.

Initiative 300 does not apply to individuals, but only to corporations and other limited liability entities. Respondents are free to own farmland and engage in farming and ranching as individuals and are not limited by Initiative 300. As Respondents are not personally limited by the prohibitions of Initiative 300, Respondents have not suffered a sufficient injury in fact which would allow them to have standing to bring their claims. In addition, Respondents do not engage in substantial business with corporations actually limited by Initiative 300 and therefore cannot bring their claims on behalf of the non-exempt corporations with which they seek to contract.

Petitioners acknowledge this Court's ruling that "where threatened action by *government* is concerned, we

do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat-for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, No. 05-608, 2007 WL 43797, at *5 (U.S. Jan. 9, 2007) (emphasis in original). However, Petitioners are not requiring that Respondents violate Initiative 300 in order to have standing to bring their claims. Petitioners only argue that Respondents' injuries are too indirect to enable them to have standing to bring their claims.

As an example, Respondent Schumacher will only be limited by the prohibitions of Initiative 300 *if* he forms a limited liability entity, and *if* that limited liability entity owns farm or ranch land in the state or engages in farming or ranching and *if* none of his family members, including his father and brother who reside only a few miles away from the farms currently owned by Respondent Schumacher, reside on or provide the day-to-day labor and management of the limited liability entity. (App. 109-10, ¶¶ 50-51). Respondent Schumacher does not have standing to bring his claims because his injuries are simply too indirect and speculative to arise as a sufficient injury in fact. At the very least, the standing requirements should require that the entity which is actually regulated by a statute, in this case a limited liability entity, be required to bring the lawsuit.

In holding that Respondents had standing to bring a Commerce Clause claim on behalf of corporations, with which Respondents did not even engage in substantial business, the Circuit Court has diminished the injury in fact requirement of Article III standing to such an extent as to make the requirement nonexistent for Commerce Clause claims. As the Circuit Court erred in finding that

Respondents had suffered a sufficient injury-in-fact which would give them standing to bring their claims, this Court should grant this Petition for Writ of Certiorari.

B. Respondents' Commerce Clause Claims Are Precluded by the Prudential Limitations to Standing.

Even if this Court finds that Respondents have suffered a sufficient injury-in-fact, the prudential limitations to standing prevent Respondents from bringing their claims on behalf of the corporations directly regulated by Initiative 300.

The third-party standing rule generally requires that a party "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564, 567, 160 L. Ed. 2d 519 (2004) (quoting *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205).

The purpose of the third-party standing rule arises out of a concern,

> that if the claim is brought by someone other than one at whom the constitutional protection is aimed, . . . the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. . . .
>
> *Id.* (internal citations omitted).

Respondents are barred from bringing their Commerce Clause claims under the third-party standing rule

because they are not directly prohibited by Initiative 300 from engaging in any activity. Only the corporations with which Respondents desire to contract are regulated by Initiative 300. Moreover, Respondents' damages arise out of their inability to engage in business with corporations limited by the provisions of Initiative 300. Such damages are merely "an economic consequence" of the state's prohibition against corporations engaging in farming or ranching, or owning farm or ranch land in the state, and any relief due to Respondents turns on the rights of corporations actually regulated by Initiative 300. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381 (8th Cir. 1997).

Clearly, Respondents' Dormant Commerce Clause claims fall squarely under the third-party standing rule, thereby prohibiting Respondents from bringing their claims on behalf of the corporations with which they wish to do business. As the Circuit Court's holding that Respondents had standing to bring their Commerce Clause claims is in conflict with this Court's third-party standing rule, Petitioners' Petition for Writ of Certiorari should be granted.

QUESTION #2

Is the Dormant Commerce Clause violated by Article XII, Section 8 of the Nebraska Constitution which applies equally to all corporations conducting business in Nebraska and has only incidental effects on interstate commerce?

When the States were creating the federal government, there was a great fear that a powerful federal

government would threaten the ability of the States to govern themselves and would threaten the freedom of individual citizens. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991).

"This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *U.S. v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626 (1995) (*quoting Gregory*, 501 U.S. at 458, 111 S. Ct. at 2395). This division of authority protects the States from a powerful federal government threatening their ability to govern themselves and safeguarding the individual liberties of their citizens. One of the Constitutionally enumerated powers delegated to Congress was the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. This delegation was necessary to provide a framework for trade among the several states, not to regulate intrastate activities or to prevent the States from adopting any law which only has an incidental effect on interstate commerce.

This case involves the States' power to regulate and limit the powers and abilities of all state-created limited liability entities, including corporations, seeking to conduct business within a state. As Initiative 300 applies equally to all limited liability entities seeking to conduct business in Nebraska, and the Family Farm Exception is based upon whether or not the entity in question is a

family-owned and operated entity, the Circuit Court erred in determining that the States were prohibited from regulating such entities under the auspices of the Dormant Commerce Clause.

To uphold the findings of the Circuit Court would severely limit the ability of the States to regulate those entities seeking to conduct business within a state's borders on grounds which do not discriminate against interstate commerce. As this Petition raises an important question concerning the balance of state and federal power under the Constitution of the United States, the Court should grant this Petition for Writ of Certiorari.

A. The States Should Be Free To Regulate Corporate Entities Whose Very Existence and Attributes Are a Product of State Law Provided Such Regulations Have Only Incidental Effects on Interstate Commerce.

As corporations are entities whose very existence and attributes are a product of state law, the States should be free to regulate such entities, provided such regulations only have incidental effects on interstate commerce. The Circuit Court held that Initiative 300 violates the Dormant Commerce Clause because the Family Farm Exception allows those corporations, in which the majority shareholder resides on or is actively engaged in the day-to-day labor and management of the corporation, to engage in farming in Nebraska. *Jones*, 470 F.3d at 1267-68. (App. 10). The Circuit Court concluded that the Family Farm Exception, therefore, discriminated against out-of-state corporations. *Id.*

However, the Circuit Court "failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of [corporations] is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89, 107 S. Ct. 1637, 1649, 95 L. Ed. 2d 67 (1987). The purpose behind Initiative 300 was to "prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land and to prohibit further establishment of non-family corporate crop and livestock operations." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). "By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce." *CTS Corp.*, 481 U.S. at 90, 107 S. Ct. at 1650. Such regulation of corporations is appropriate as it "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *CTS Corp.*, 481 U.S. at 91, 107 S. Ct. at 1650.

As Initiative 300 applies equally to all corporations and only has incidental effects on interstate commerce, the Circuit Court, in finding Initiative 300 invalid under the Dormant Commerce Clause, has severely hindered the ability of States to regulate the powers and abilities of corporations, which are purely creatures of state law.

B. The Circuit Court Refused to Adopt a Plausible Interpretation of an Enactment Which Does Not Facially Discriminate Against Interstate Commerce.

The Circuit Court further erred in refusing to adopt a plausible interpretation of Initiative 300 which did not

violate the Dormant Commerce Clause. As the Circuit Court ruling is in direct conflict with the basic canon of constitutional construction, that a court should adopt a possible interpretation of a statute which does not raise constitutional problems, the Court should grant this Petition for Writ of Certiorari.

One of the canons of constitutional construction recognized by this Court is "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300, 121 S. Ct. 2271, 2279, 150 L. Ed. 2d 347 (2001) (quoting *Crowell v. Benson,* 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932)). As the Circuit Court refused to adopt a valid interpretation of Initiative 300 which did not violate the Dormant Commerce Clause, the Circuit Court's holding is in direct conflict with well-settled law of this Court.

The Circuit Court held that the Family Farm Exception to Initiative 300 found in Article XII, Section 8(1)(A) of the Nebraska Constitution (hereinafter "Family Farm Exception") facially discriminates against interstate commerce because it requires that the majority shareholder, or a family member, either reside on or provide the day to day labor and management of the operation. *Jones*, 470 F.3d at 1268. (App. 10). The Circuit Court found that such a requirement "favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them." *Id.* (quoting *Jones v. Gale*, 405 F.Supp.2d at 1081). (App. 10).

However, the Family Farm Exception does *not* require the majority shareholder or a family member to reside on or engage in farming on land *in Nebraska*. Instead, the Family Farm Exception provides an exception based on the determination of whether the corporation qualifies as a family farm corporation, *regardless of where that farm is located*.

Pursuant to the plain language of Initiative 300, a Colorado corporation could qualify for the Family Farm Exception and own farmland in Nebraska, provided the majority shareholder or one of his family members resides on or is actively engaged in the day-to-day labor and management of a *Colorado* farm. Such an interpretation of Initiative 300 does not discriminate against interstate commerce.

The Circuit Court, however, held that the phrase "'of the farm or ranch' can only refer to a farm or ranch in Nebraska" and therefore concluded that the Family Farm Exception favors Nebraska corporations. *Jones*, 470 F.3d at 1268. (App. 11-12). As the Circuit Court chose to ignore an interpretation of Initiative 300 which did not facially violate the Dormant Commerce Clause, the Circuit Court's holding is in direct conflict with this Court's basic canon of constitutional construction.

In addition, the Circuit Court's interpretation of the Family Farm Exception leads to the nonsensical result that each corporation farming land that is not contiguous is actually operating numerous individual farms instead of one, single farming operation. Under the Circuit Court's analysis, the majority shareholder, or a family member, would be required to reside on *each tract of land* owned by

the corporation in order to qualify for the Family Farm Exception.

The more logical interpretation of the Family Farm Exception would require that the majority shareholder or family member must reside on *any* tract or parcel of farm or ranch land owned by the corporation. Following this line of reasoning, a corporation could also qualify for the Family Farm Exception if the majority shareholder or a family member provides the day to day labor and management on any tract of land, inside or outside of Nebraska, which is owned by the corporation. Such an interpretation is fairly derived from the plain language of the Family Farm Exception and does not unduly burden interstate commerce as it does not discriminate against a corporation based on its status of being an out-of-state corporation, but instead on its status of being a non-family farm corporation.

As Initiative 300 can be interpreted in a way that does not facially discriminate against interstate commerce, the Circuit Court erred in finding that Initiative 300 on its face violated the Commerce Clause. "If a law is susceptible of a reasonable interpretation which supports its constitutionality, the court must accord the law that meaning. *Planned Parenthood of Minnesota v. State of Minn.*, 910 F.2d 479, 482 (8th Cir. 1990); *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32, 83 S. Ct. 594, 597, 9 L. Ed. 2d 561 (1963). Since Initiative 300 can be interpreted in a way that does not facially violate the Commerce Clause, the Supreme Court should grant this Petition for Writ of Certiorari.

C. The Decision of the Circuit Court Conflicts with the Previous Determination of the Intent of Initiative 300.

The Circuit Court's conclusion that Initiative 300 was adopted with a discriminatory intent against interstate commerce also conflicts with a previous holding of the Circuit Court. The Circuit Court relied upon its previous holding in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003), the language of Initiative 300, and the ballot title to conclude that "[t]he manifest purpose of Initiative 300 . . . was to differentiate, or discriminate between family farm corporations located in Nebraska as opposed to those located elsewhere." *Jones*, 470 F.3d at 1269. (App. 14).

However, the Circuit Court's conclusion is in direct conflict with its previous holding that the intent of Initiative 300 was to "retain and promote family farm operations in Nebraska and . . . to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). It is clear from the Circuit Court's previous holding that the purpose of Initiative 300 was to retain and promote family farms and to prevent non-family farm corporations from owning farmland in Nebraska; a purpose which does not discriminate against interstate commerce. The Circuit Court did not overturn its previous holding and, in fact, made no attempt to distinguish its findings in the present case from its previous holding in *MSM Farms, Inc.* As the Circuit Court's previous determination of the purpose of Initiative 300 does not discriminate against interstate

commerce, the Court should grant this Petition for Writ of Certiorari.

QUESTION PRESENTED #3

When the highest court of a state has recognized the concept of severability in state enactments, is it appropriate for a federal court to overturn an entire state enactment when only a severable portion of that enactment has been found to violate our federal constitution?

The Circuit Court's decision not to sever what it found to be the unconstitutional portions of Initiative 300 is in conflict with controlling law of the highest court of the State of Nebraska. *Jones*, 470 F.3d at 1271. (App. 17). When a state law is challenged on the basis of federal law, "state law is displaced only 'to the extent that it actually conflicts with federal law.'" *Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474, 476, 116 S. Ct. 1063, 1064, 134 L. Ed. 2d 115 (1996) (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204, 103 S. Ct. 1713, 1722, 75 L. Ed. 2d 752 (1983)).

The Circuit Court in the present case upheld the ruling of the District Court that Initiative 300 discriminates against interstate commerce in violation of the Commerce Clause. *Jones*, 470 F.3d at 1271. (App. 17). The District Court found that the specific language which caused Initiative 300 to be unconstitutional was that language which helps define the Family Farm Exception, "*at least one of whom is a person residing on or actively engaged in the day to day labor and management of the*

farm or ranch. . . . " Jones v. Gale, 405 F.Supp.2d at 1087. (App. 55).

Nebraska case law is controlling as to the issue of whether a provision may be severable. The Nebraska Supreme Court has held, in determining the severability of a voter initiative, a court must first examine "whether, absent the invalid portion, a workable and independently enforceable plan remains." *Duggan v. Beermann*, 249 Neb. 411, 429, 544 N.W.2d 68, 79 (1996). An entire act fails only when the "invalid portions [of a statute] are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated . . . " *Duggan*, 249 Neb. at 428, 544 N.W.2d at 79; (quoting *State ex rel. Douglas v. Herrington,* 206 Neb. 516, 524, 294 N.W.2d 330, 334 (1980)).

In the present case, the District Court previously acknowledged "Initiative 300 could well provide a workable plan, independently enforceable, if the 26 words at issue were stricken. Corporations and syndicates would be prohibited from engaging in farming or ranching in Nebraska, with exceptions made for family-farm corporations and limited partnerships." *Jones v. Gale*, 405 F.Supp.2d at 1087-88. (App. 56). Therefore, because a workable plan remains even if the offending language in the Family Farm Exception was severed, the Circuit Court should have severed the offending language of the Family Farm Exception and upheld the remainder of Initiative 300.

The second factor of the severability analysis is "whether the unconstitutional portion was such an inducement that the constitutional portions would not have passed without it." *Duggan*, 244 Neb. at 430, 544 N.W.2d at 79. The Circuit Court found that the residency and day

to day labor and management requirements were such an inducement and that Initiative 300 would not have been adopted without the provision. *Jones*, 470 F.3d at 1271 (quoting *Jones v. Gale*, 405 F.Supp.2d at 1088). (App. 17)

However, although the Family Farm Exception itself is an inseparable part of Initiative 300, the requirement that the majority shareholder reside on or be actively engaged in the day to day labor and management of the operation is not inextricably entwined with the remainder of the statute. Certainly, from a reading of the explanatory statement and the ballot title, it is clear that the voters sought to adopt a constitutional amendment which prohibited corporations from owning farm or ranch land or engaging in farming or ranching, with an exception for family farm or ranch corporations. (App. 67-68, ¶¶ 17, 20). But nowhere within the explanatory statement or the ballot title will one find the requirement that in order to qualify for the Family Farm Exception, the majority shareholder must reside on or be actively engaged in the day to day labor and management of the corporation. (App. 67-68, ¶¶ 17, 20). Although the language in question certainly provides some clarification as to what constitutes a family farm corporation, it by no means can be construed as the motivating factor driving the adoption of Initiative 300 as such language was not even important enough to be included as part of the ballot language or explanatory statement and therefore, the second prong of the severability test is satisfied.

The final factor to be considered, but which is not determinative, is whether Initiative 300 has a severability clause. *Duggan*, 249 Neb. at 432, 544 N.W.2d at 80-81. In the present case, there is no severability clause, which the Circuit Court found warranted the conclusion that the

residency and day to day labor and management requirement could not be severed from the remainder of Initiative 300. *Jones*, 470 F.3d at 1271. (App. 17). However, because the residency and day to day labor and management requirement is otherwise severable, the Circuit Court should have followed the Supreme Court's admonition that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton*, 516 U.S. at 476, 116 S. Ct. at 1064.

In ruling that the offending language was not severable from the remainder of Initiative 300, the Circuit Court ignored the well-settled law of the United States Supreme Court to only invalidate a statute to the extent necessary. *Dalton*, 516 U.S. at 476, 116 S. Ct. at 1064. In addition, the Circuit Court's holding is in direct conflict with the controlling case law of the Nebraska Supreme Court, the application of which would justify the severance of the unconstitutional language of Initiative 300 and a ruling that the remainder of Initiative 300 should continue in full force and effect. *Duggan*, 249 Neb. at 428-32, 544 N.W.2d at 79-81.

QUESTION PRESENTED #4

When facts are in dispute and a circuit court must weigh evidence presented by the parties, is summary judgment appropriate under the standards articulated by this court?

Finally, the Circuit Court misapplied this Court's summary judgment standard in ruling that this case could be decided on summary judgment. Petitioners are entitled to their day in Court and should not be denied that right on the basis of the Circuit Court's misapplication of the

summary judgment standard. Therefore, in order to preserve Petitioners' Seventh Amendment Rights to a fair trial, the Court should grant this Petition for Writ of Certiorari.

A Summary Judgment Was Inappropriate as the Facts Relied Upon in Determining Standing Are in Dispute.

The facts upon which the Circuit Court relied in determining that Respondent Schumacher had standing to bring his claims are in dispute and therefore summary judgment was inappropriate. *Jones*, 470 F.3d at 1266. (App. 6). For purposes of summary judgment, a court should not weigh the evidence presented, but should view the evidence in a light most favorable for the non-moving party in determining whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962).

The Circuit Court found that "[n]either [Schumacher] nor any of his relatives reside on his farmland and he does not live close enough to the land to perform the day-to-day labor and manage it." *Jones*, 470 F.3d at 1266. (App. 6). The Circuit Court concluded, therefore, that Schumacher was unable to meet the Family Farm Exception. *Id.*

However, evidence was presented to the Circuit Court that Schumacher could have qualified for the Family Farm Exception because Schumacher's "brother Tim Schumacher and his father Matt Schumacher live in Platte Center, at the center of Platte County, where some of the Schumacher family land is located. . . . The Schumacher farm is located

within a few miles of the residence of Matt and Tim Schumacher." (App. 109-110, ¶¶ 49-51). As members of Schumacher's family could have provided the day to day labor and management of Schumacher's farm, Schumacher could have qualified for the Family Farm Exception and therefore did not have standing to bring his claims. The Circuit Court, in presuming that Schumacher could not qualify for the Family Farm Exception, relied upon facts which were in dispute and therefore, summary judgment was inappropriate.

The Circuit Court's recent trend of affirming summary judgments where there is a dispute of material fact has severely eroded the Seventh Amendment right of parties to a trial. *See Melvin v. Car-Freshener Corp.*, 453 F.3d 1000 (8th Cir. 2006); *Fender v. Bull*, 166 Fed.Appx. 869 (8th Cir. 2006); *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606 (8th Cir. 2006); *James ex rel. James v. Friend*, 458 F.3d 726 (8th Cir. 2006); *Green v. Franklin Nat. Bank of Minneapolis*, 459 F.3d 903 (8th Cir. 2006).

Senior Judge Donald Lay, has identified the Circuit Court's misuse of summary judgment in declaring in a dissenting opinion that,

> [t]oo many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. . . . Summary judgment should be the exception, not the rule. It is appropriate *"only . . . where it is quite clear what the truth is, . . . for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 467, 82

> S. Ct. 486, 7 L. Ed. 2d 458 (1962) (emphasis added) (citation and internal quotations omitted).
>
> It is undeniable that summary judgment is a valuable tool, the use of which allows overextended courts to remove cases that lack merit from their dockets. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). However, in accomplishing this goal, we have an obligation not to "overlook[] considerations which make . . . summary judgment an inappropriate means to that very desirable end." *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944).

Melvin v. Car-Freshener Corp. 453 F.3d at 1004 (dissent).

In the present case, the Circuit Court, in concluding Respondents had standing, relied upon facts which were in dispute and viewed those facts in favor of Respondents, the moving party. *Jones*, 470 F.3d at 1266. (App. 6). As the Circuit Court improperly applied this Court's standard for summary judgment, the Court should grant this Petition for Writ of Certiorari.

B. The Circuit Court Improperly Imposed the Burden on the Nonmoving Party, on a Motion for Summary Judgment, to Establish the State Had No Other Means to Advance a Legitimate Local Interest.

The Circuit Court also improperly imposed the burden on the nonmoving party to establish, on a motion for summary judgment, that it had no other means to advance a legitimate local interest. *Jones*, 470 F.3d at 1270. (App. 15-16). As the Circuit Court's holding is in conflict with

this Court's summary judgment standard, the Court should grant this Petition for Writ of Certiorari.

Petitioners presented a substantial amount of evidence regarding the legitimate local interests which the state had no other means, but through Initiative 300, to advance. (App. 90-91, 96-97, 106-07). The legitimate local interests included,

> (a) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor; . . . (d) Erosion of agricultural markets free of production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers; (e) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations requiring fewer laborers to operate; (f) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point of origin by non-family farm and ranch corporations; and (g) Ability of non-family farm and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

(App. 90-91, 96-97).

The Circuit Court ignored the evidence presented by Petitioners and instead found that Petitioners "do not indicate why land use and environmental regulations could not resolve any difficulties associated with absentee ownership." *Jones*, 470 F.3d at 1270. (App. 15-16). The Circuit Court further found fault with the State's use of a

"vague definition" of "negative effects on the social and economic culture of rural Nebraska" as a legitimate state interest the State sought to advance. *Jones*, 470 F.3d at 1270. (App. 16).

But Petitioners' use of such vague terms was absolutely necessary given that this case was decided on summary judgment. Had Petitioners been given the opportunity at trial to present evidence of legitimate local interests, which it could advance by no other means, perhaps the detail sought by the Circuit Court could have been more clearly articulated. It is precisely because this case was determined on summary judgment that the interests presented were vague. If more detail was sought, the Circuit Court should not have weighed the evidence presented, but should have found there was substantial dispute of material facts which warranted the reversal of the District Court's grant of summary judgment.

Petitioners acknowledge that the Circuit Court's ruling in this case is consistent with its previous ruling in *Hazeltine* that South Dakota's version of a corporate farming ban was adopted with a discriminatory purpose and reasonable, non-discriminatory means exist to advance the state's interest of protecting the family farm. 340 F.3d at 596-97. However, at least the Defendants in *Hazeltine* were given the opportunity, at a trial on the merits, to fully present its legitimate state interests and the lack of nondiscriminatory means to advance these state interests. 340 F.3d at 593-96.

The Circuit Court's analysis, in the present case, as to whether Petitioners had presented any evidence of a legitimate state interest sought to be advanced by Initiative 300 is yet another example of the Circuit Court's

abuse of summary judgment. As explained by Eighth Circuit Senior Judge Lay, "[t]oo many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain." *Melvin*, 453 F.3d at 1003-04 (Judge Lay, dissent).

As the Circuit Court imposed the burden on Petitioners to establish a legitimate local interest to be advanced by Initiative 300 on summary judgment, and then discredited the evidence presented, the Circuit Court improperly applied the Supreme Court's standard for summary judgment. *Jones*, 470 F.3d at 1270. (App. 15-16). The Circuit Court's ruling allows judges to weigh evidence and make rulings on said evidence before trial thereby usurping the Seventh Amendment rights which should be afforded to all parties to a case. Therefore, this Petition for Writ of Certiorari should be granted.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 23rd day of January, 2007.

JOHN GALE, In his official capacity as Secretary of State of Nebraska; and, JON BRUNING, In his official capacity as Attorney General of Nebraska, Petitioners,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-1308

Jim Jones; Terrence M. Schumacher; Shad Dahlgren; Harold G. Rickertsen; Todd Ehler; Robert E. Beck, III,

Appellees,

v.

John Gale, in his official capacity as Secretary of State of Nebraska; Jon Bruning, in his official capacity as Attorney General of Nebraska,

Appellants.

Organization for Competitive Markets; R-Calf USA; Oregon Livestock Producers Association; Spokane County Cattle Producers; Icon; The Independent Beef Association of North Dakota; Montana Cattleman's Association; Nevada Livestock Association; State of Minnesota; State of Iowa; State of Missouri; State of North Dakota; State of West Virginia; Nebraska Farmers Union; The Center for Rural Affairs; The Nebraska Grange; Women Involved in Farm Economics; The Nebraska Catholic

* Appeal from the
* United States
* District Court for the
* District of Nebraska.

Conference; The American Corn Growers of Nebraska; Nebraska Appleseed Center for Law in the Public Interest; Sierra Club; The Great Plains Environmental Law Center; Nebraska Environmental Action Coalition; Michael Jacobson; Nebraska League of Rural Voters; Nebraskans for Peace; National Farmers Union; National Family Farm Coalition; American Corn Growers; Minnesota Farmers Union; Land Stewardship Project; North Dakota Farmers Union; Dakota Resource Council; South Dakota Farmers Union; Dakota Rural Action; Iowa Farmers Union; Iowa Citizens for Community Improvement; Missouri Farmers Union; Missouri Rural Crisis Center; AR Farmers Union; Campaign For Family Farms; Western Organization of Resource Councils; Federation of South Cooperatives; Illinois Farmers Union; Illinois Stewardship Alliance; IN Farmers Union; Citizens Action Coalition of Indiana; Powder River Basin Resource Council; KS Farmers Union; WI Farmers Union; OH Farmers Union; MI Farmers Union; Pennsylvania Farmers Union; Rocky Mountain Farmers Union; Montana Farmers Union; Utah Farmers Union; Texas Farmers Union; Alaska Farmers Union; Oregon Farmers Union; *

WA Farmers Union; California Farmers Union,

Amici on behalf of Appellants.

Nebraska Bankers Association; Nebraska Chamber of Commerce and Industry, Inc.; The Nebraska Realtors Association; South Dakota Farm Bureau,

Amici on Behalf of Appellees.

United States of America,

Amicus on Behalf of Appellees.

Submitted: September 28, 2006
Filed: December 13, 2006

Before ARNOLD, BYE, and MELLOY, Circuit Judges.

ARNOLD, Circuit Judge.

The plaintiffs, six people who own various interests in Nebraska farm and ranch land operations, filed this action against Nebraska's secretary of state and attorney general in their official capacities (State Officials). The plaintiffs claimed that Initiative 300, which voters adopted as part of the state constitution in 1982, *see* Neb. Const. art. XII, § 8, violates the commerce clause, privileges and immunities clause, and equal protection clause of the United States Constitution and the Americans with Disabilities Act (ADA). All parties moved for summary judgment. The

district court[1] granted summary judgment to the plaintiffs on their commerce clause and ADA claims, and granted summary judgment to the State Officials on the remaining claims. The State Officials appeal, and we affirm the district court's judgment that the amendment based on Initiative 300 is unconstitutional because it violates the dormant commerce clause.

I.

Initiative 300 prohibits corporations or syndicates (non-family-owned limited partnerships) from acquiring an interest in "real estate used for farming or ranching in [Nebraska]" or "engag[ing] in farming or ranching," with certain exceptions. *See* Neb. Const. art. XII, § 8. The initiative originated as a constitutional amendment proposed through the initiative process and appeared as a ballot question on Nebraska's 1982 general election ballot. The Nebraska Attorney General prepared a ballot title and explanatory statement for Initiative 300. *See* Neb. Stat. § 32-1410(1). The title read: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" An explanatory statement defines the effect of a vote for and against a measure. *Id.* The explanatory statement presented to Nebraska voters for Initiative 300 read: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family

[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." The voters adopted Initiative 300, and it became part of the Nebraska constitution upon the issuance of a proclamation by the governor in 1982.

The Initiative defines a "family farm or ranch corporation," which is specifically excepted from the initiative's restrictions, as "a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family . . . at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." Neb. Const. art. XII, § 8. In addition, an exemption from the corporate farming ban is provided, *inter alia*, to former "family farm corporations" for a period of fifty years after they cease to meet the criteria for that designation, provided that majority ownership of the corporation remains within the family. *Id.*

II.

The State Officials contend that none of the plaintiffs had standing to bring the commerce clause claim and therefore the district court erred in concluding that it had jurisdiction. A plaintiff has the burden of establishing subject matter jurisdiction, *Hoekel v. Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir. 1994) (per curiam), *cert. denied*, 513 U.S. 974 (1994), for which standing is a prerequisite, *Faibisch v. University of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). To establish standing, a plaintiff is required to show that he or she had " 'suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical.' Second, the injury must be traceable to the defendant's challenged action. Third, it must be 'likely' rather than 'speculative' that a favorable decision will redress the injury." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), *cert. denied*, 541 U.S. 1037 (2004).

We review the district court's conclusion that the plaintiffs had standing *de novo*. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484 (8th Cir. 2006). Although the district court concluded that all of the plaintiffs had standing to bring the commerce clause claim, we have said previously that "where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial" to jurisdiction. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992) (internal quotation marks omitted) (citing *Bowen v. Kendrick*, 487 U.S. 589, 620 n. 15 (1988)).

Plaintiff Terrence Schumacher, a resident of Boulder, Colorado, has an ownership interest in Nebraska farmland in five counties. Neither he nor any of his relatives reside on his farmland and he does not live close enough to the land to perform the day-to-day labor and manage it. Mr. Schumacher would like to transfer his farmland to a limited liability entity, which would, *inter alia*, allow for improved fiscal planning and operational management of the farmland as an operating unit and provide more favorable options for estate planning. Initiative 300 precludes Mr. Schumacher from creating a limited liability farm operation because he does not meet the conditions of the family farm exemption, and as a result he has suffered and continues to suffer economic loss based on reduced

fiscal and operational management efficiencies, marketing opportunities, and borrowing power, as well as increased administration expenses and federal estate taxes. Because Mr. Schumacher cannot qualify for the family farm exemption, he is exposed to personal liability for the debts, obligations, contracts, and torts related to his Nebraska farmland.

The State Officials acknowledge that Mr. Schumacher may not purchase farmland on a limited liability basis unless he or a member of his family resides on the farmland or is engaged in the farm's day-to-day labor and management. But they argue that he nevertheless lacks standing because the family-farm requirements apply to everyone and thus do not unduly burden Mr. Schumacher's interests. We think, however, that the question of interstate commerce 'burdens' pertains to the merits of Mr. Schumacher's claim and is "analytically distinct from the 'injury-in-fact' determination that is central to standing." *Adams v. Watson*, 10 F.3d 915, 925 n. 16 (1st Cir. 1993).

Robert Beck III, another plaintiff, resides in rural Kearney, Nebraska, where he owns a cattle feedlot that provides for the daily care and feeding of cattle owned by his customers, many of whom live outside of Nebraska. Mr. Beck cannot contract with non-exempt out-of-state corporate entities for the purpose of raising and feeding livestock for slaughter. Mr. Beck alleges that as a result, he has lost business, income, and borrowing power. He further alleges that Initiative 300 has prevented him from gaining unfettered access to the national cattle market, and thereby reduced his competitiveness and ability to gain new customers resulting in economic loss. In addition, Mr. Beck's access to working capital from out-of-state

corporations is restricted because Initiative 300 prohibits non-exempt entities that provide equity in the form of ownership of cattle from feeding cattle at Mr. Beck's feedlot. The initiative prohibits him from freely changing ownership of his commercial cattle feeding operations and limits his ability to pool assets and resources with other unrelated Nebraska farmers and out-of-state corporations to acquire more land and personal assets for future development of his cattle operation. Finally, Initiative 300 prevents Mr. Beck from establishing succession plans that would allow him to transfer ownership gradually to employees who provide the day-to-day labor while he continues to manage the operation.

The State Officials acknowledge that under *Hazeltine*, 340 F.3d at 392, a plaintiff who does substantial business with out-of-state corporations and would suffer imminent business losses as a result of the challenged law has standing to bring a commerce clause claim. They argue, however, that Mr. Beck lacks standing because he does not have "actual contracts with out-of-state corporations" and therefore did not suffer an injury in fact.

But we agree with the district court that the predicaments of Messrs. Schumacher and Beck are comparable to those of the plaintiffs in *Hazeltine*, who we concluded had standing to challenge an amendment to the South Dakota Constitution that prohibited corporations and syndicates from holding land in the state. *See Hazeltine*, 340 F.3d at 591-92. We also think that the plaintiffs have standing to challenge the constitutionality of a law that has a direct negative effect on their "'borrowing power, financial strength, and fiscal planning,'" *see Hazeltine*, 340 F.3d at 592 (quoting *Clinton v. City of New York*, 524 U.S. 417, 431 (1998)). We do not believe that Mr. Beck was required to

show that he had contracted with an out-of-state corporation in order to have standing. Both Mr. Schumacher and Mr. Beck explained how Initiative 300 had negatively affected their ability to earn income, borrow, and plan for their financial future. Mr. Schumacher's asserted inability to dispose of his land as he wishes weakens his financial position in precisely the way that meets the conditions we set out in *Hazeltine* and that the Supreme Court established in *Lujan*: His claim involves a concrete and actual injury that can be traced back to the State Officials, and it is entirely likely that a favorable ruling will redress the injury. Because Messrs. Schumacher and Beck have standing, the district court had jurisdiction over the case.

III.

We turn now to the question of whether Initiative 300 violates the dormant commerce clause of the United States Constitution. Where the relevant facts are not in dispute, we review *de novo* the question of whether a state constitutional provision violates the commerce clause. *See R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002).

The dormant commerce clause prohibits states from enacting laws that "discriminate against or unduly burden interstate commerce." *Hazeltine*, 340 F.3d at 592-93. As we explained in *Hazeltine*, when determining whether a law violates the dormant commerce clause, we ask first "whether the challenged law discriminates against interstate commerce. Discrimination in this context refers to 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 593. (quoting *Oregon Waste Sys., Inc. v.*

Department of Envtl. Quality, 511 U.S. 93, 99 (1994)). A law "overtly discriminates" against interstate commerce if it is discriminatory on its face, if it has a discriminatory purpose, or if it has a discriminatory effect. *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000).

A.

We consider first whether Initiative 300 is discriminatory on its face. The State Officials argue that because Initiative 300 does not expressly prohibit the owning of agricultural land by out-of-state citizens and does not exclude solely out-of-state corporations, it cannot be interpreted to discriminate facially against interstate commerce. We do not think that an interstate-commerce claim is precluded by the absence of an express prohibition on non-resident ownership or the fact that some Nebraska corporations (those that are not "family farm corporations") may suffer a negative impact under Initiative 300, *see C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391-92 (1994). We conclude instead that Initiative 300 is facially discriminatory because its prohibition against farming by corporations and syndicates does not apply to family farm corporations or limited partnerships in which at least one family member resides on or engages in the daily labor and management of the farm. We agree with the district court's holding that "Initiative 300 on its face, therefore, favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them." *Jones*, 405 F.Supp.2d at 1081.

The State Officials maintain that this is an incorrect interpretation of Initiative 300. They argue that the law does not require the majority shareholder to live or work on farmland in Nebraska to qualify for the exception; they assert that a Colorado family farm corporation, for example, could operate on land in Nebraska as long as its majority shareholder or one of his or her family members lived or worked at the location of the corporation's Colorado farm. This argument is meritless. Although, as the officials observe, "[i]f a law is susceptible of a reasonable interpretation which supports its constitutionality, the court must accord the law that meaning," *Planned Parenthood of Minnesota v. State of Minnesota*, 910 F.2d 479, 482 (8th Cir. 1990), we do not believe that the interpretation offered by the State Officials is reasonable. Instead, their proposed interpretation of the family farm exemption, which attempts to avoid the interstate commerce problem, is untenable because it conflicts with the plain language of Initiative 300, contradicts the ballot language presented to voters, and is inconsistent with the Nebraska Supreme Court's reading of the law.

We give the words of Initiative 300 their most natural and obvious meaning. *See Pig Pro Nonstock Coop. v. Moore*, 253 Neb. 72, 83, 568 N.W.2d 217, 224 (1997); *see also Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999). As plaintiffs point out, the initiative regulates the ownership of land "in *this* state" and requires residing on or engaging in the daily labor and management "of *the* farm or ranch." Neb. Const. art. XII, § 8 (emphases added). The focus of the text is thus on activities within the state of Nebraska, and the phrase "of the farm or ranch" can only refer to a farm or ranch in Nebraska. Despite the State

Officials' heroic effort to develop a plausible alternative construction, we think it rather plain that Initiative 300 requires residing or working on a Nebraska farm.

Our reading acquires further support from the ballot language that accompanied the text when Initiative 300 was voted on. As we have already said, the ballot stated that the amendment's purpose was to prohibit further purchases of agricultural land "by any corporation . . . other than . . . a *Nebraska* family farm corporation." *Jones*, 405 F.Supp.2d at 1073 (emphasis added). The words "a Nebraska family farm corporation" cannot reasonably be read to mean that family farm corporations in other states could qualify.

The Nebraska Supreme Court's interpretation of Initiative 300 also undermines the State Officials' proposed construction. The court stated that "the plain language of Article XII § 8" prohibits "absentee ownership and operation of farm and ranch land by a corporate entity." *Pig Pro.*, 253 Neb. at 91, 568 N.W.2d at 228. If the initiative meant to prohibit absentee ownership, it would manifestly defeat its purpose to interpret it to mean that a corporation located in some other state would be allowed to operate farmland in Nebraska.

The State Officials quote *Dempsey* for the proposition that when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *See Dempsey*, 167 F.3d at 461 (internal quotations and citations omitted). But the officials are engaging in selective quotation. In *Dempsey*, we specifically held that we always begin statutory interpretation with the "plain language of the statute itself" and that we will construe a

statute to avoid constitutional problems only if its "language is ambiguous" and such a construction does not plainly contradict the "legislative intent." *Id.* As we have said, the language of Initiative 300 plainly requires residing or working on a Nebraska farm; thus there is no ambiguity to construe. We note, moreover, that even if there were an ambiguity, we would reject the State Officials' proposed interpretation because it would frustrate the voters' intent, which we address more fully below.

Thus, we read Initiative 300 as the district court did and hold that Initiative 300 is discriminatory on its face because it affords "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Hazeltine*, 340 F.3d at 593 (internal citations omitted).

B.

Although we have already determined based on a facial review that Initiative 300 is discriminatory, we agree with the district court that there is another, independent reason for concluding that it burdens out-of-state interests: The initiative has a discriminatory intent. *Cf. Hazeltine*, 340 F.3d at 593. As the State Officials point out, the Nebraska Supreme Court has held that the intent of the voters in adopting an initiative amendment to the state constitution must be determined from the words of the amendment itself. *See Pig Pro*, 253 Neb. at 82, 568 N.W.2d at 223-24. But the State Officials admit that we are not bound by the Nebraska Supreme Court's precedent on this point. Rather, as we have held previously, we "look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose,"

which may include evidence in the form of "statements by lawmakers." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004). In determining the purpose of an initiative amendment in *Hazeltine*, 340 F.3d at 593-96, we relied on the statements and conduct of the amendment's drafters. And in *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995), we considered a pamphlet prepared for voters by the state attorney general in determining whether a referendum had a discriminatory intent.

The text of Initiative 300 and the ballot title reveal its discriminatory purpose. Under Nebraska law, a "ballot title shall express the purpose of the measure" submitted to the voters, Neb. Stat. § 32-1410(1), and here the ballot title told voters that Initiative 300 would "prohibit[] ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation." We agree with the district court that the "ballot title, and the language of Initiative 300 defining limited-liability-entity exemptions for family farms and ranches, clearly indicate that people living and working in Nebraska, and their families, will be given . . . favored treatment." *Jones*, 405 F.Supp.2d at 1080. The manifest purpose of Initiative 300 therefore was to differentiate, or discriminate, between family farm corporations located in Nebraska as opposed to those located elsewhere.

Further, while we deem it unnecessary to discuss in detail the history preceding the adoption of Initiative 300, we believe that that history bolsters the plaintiffs' contention that discriminatory intent motivated voters to adopt Initiative 300. To name but one example, television advertisements that supporters of Initiative 300 produced before its adoption concluded by stating: "Let's send a message to

those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300." It is clear beyond cavil that these ads bristle with an animus against out-of-state corporations.

C.

We have concluded that Initiative 300 discriminates against out-of-state entities both on its face and because of its discriminatory intent. And if a state constitutional provision "is indeed discriminatory, it is '*per se* invalid' unless the [State] 'can demonstrate, under rigorous scrutiny, that [it has] no other means to advance a legitimate local interest.'" *Hazeltine*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

The State Officials argue that some of the threats that stem from unrestricted corporate ownership of Nebraska farm and ranch land include absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's land, water, and natural resources. While the State Officials concede the district court's finding that the third problem could be resolved through other means, as, for instance, by regulation, they assert that the first two issues require the intervention of Initiative 300.

As the plaintiffs point out, however, the State Officials' argument with respect to preventing absentee ownership of land is directly contradicted by their interpretation of the family farm exception, under which an out-of-state corporation could own farmland or engage in farming operations without residing or performing daily labor in Nebraska. In addition, the State Officials do not

indicate why land use and environmental regulations could not resolve any difficulties associated with absentee ownership. We think that the same holds true for the State Officials' claim about the "negative effects on the social and economic culture of rural Nebraska," though we cannot be sure what is meant by these terms. It appears in fact that the State Officials are attempting to obfuscate the issue by using such a vague definition of these "negative effects" that the definition itself is what prevents us from suggesting concrete alternative measures. Were the state interests more clearly defined, we would be able to discern whether specific regulations could address the particular difficulties that frustrate the promotion of those interests. We assume that a mere desire to maintain the status quo cannot in itself be a "legitimate local interest." Indeed, it is that kind of xenophobia that the dormant commerce clause sets its face against.

The State Officials failed to meet their burden of showing that Nebraska could not advance a legitimate local interest without discriminating against non-resident farm corporations and limited partnerships. The amendment passed as a result of Initiative 300 thus fails the conditions that we set out in *Hazeltine*, and we affirm the district court's holding that Neb. Const. art. XII, § 8 violates the dormant commerce clause both on its face and based on its discriminatory intent.

IV.

The State Officials urge us not to hold the entire amendment unconstitutional even if part of it is unconstitutional in its current form; rather, they say, we should sever its unconstitutional portions. As the district court

explained, the Nebraska Supreme Court has held that a portion of a statute is severable if a "workable plan" remains after severance, the valid portions are "independently enforceable," the invalid portion did not serve as "such an inducement to the valid parts that the valid parts would not have passed without the invalid part," and severance will not violate the "intent of the Legislature." *Jaksha v. State*, 241 Neb. 106, 129, 486 N.W.2d 858, 873 (1992), *as quoted in Jones*, 405 F.Supp.2d at 1087. We note, as did the district court, that the Nebraska Supreme Court has held that the constitutional part of an initiative to amend the state constitution "may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining [part]." *Duggan v. Beerman*, 249 Neb. 411, 430, 544 N.W.2d 68, 79-80 (1996).

While severing the unconstitutional portion of the initiative amendment here leaves a workable plan that is independently enforceable, a severance would not satisfy the conditions that the Nebraska Supreme Court has outlined for a severance. Initiative 300 contains no severability clause and, like the district court, we "cannot conclude that the residency or day-to-day labor-and-management provisions in the family-farm exemption were not an inducement to the passage of Initiative 300," *Jones*, 405 F.Supp.2d at 1088. Reading the amendment as we do, it would clearly violate the voters' intent to sever the portion in dispute. We thus have no other option than to affirm the district court's judgment and hold that the entire amendment based on Initiative 300 is unconstitutional.

V.

The State Officials also argue that six witness declarations, three depositions, certain deposition exhibits, and two videotape exhibits, all of which the plaintiffs offered in support of their motion for summary judgment, contained information that was not relevant to the adjudication of this case. We have considered the State Officials' objections and conclude that they are meritless.

VI.

Because we agree with the district court's decision on the grounds that Neb. Const. art. XII, § 8 violates the dormant commerce clause, we have no occasion to reach the question of whether it also violates the ADA. We note that it may become necessary to address that question if the plaintiffs pressing the ADA claim move for and receive attorneys' fees in the district court. Until that happens, however, we see no reason to rule on the question of the applicability and effect of the ADA in the current circumstances of the case.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,	)	
Plaintiffs,	)	**CASE NO. 8:04CV645**
vs.	)	
JOHN GALE, et al.,	)	**MEMORANDUM AND ORDER**
Defendants.	)	

(Filed: 12/15/2005)

This matter is before the Court on the Defendants' Motion for Summary Judgment (Filing No. 68), and the Plaintiffs' Motion for Summary Judgment (Filing No. 82). For the reasons stated below, both motions will be granted in part and denied in part.

PROCEDURAL BACKGROUND

Plaintiffs Jones, *et al.*, have challenged the constitutionality of Neb. Const. art. XII, § 8 ("Initiative 300"), alleging that its enforcement violates the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the United States Constitution, as well as 42 U.S.C. § 1983, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). (Complaint, ¶ 12, Filing No. 1, 4:04cv3194). They seek declaratory and injunctive relief against two Defendants: Nebraska Attorney General Jon Bruning in his official capacity, and Nebraska Secretary of State John Gale in his official capacity.

The Defendants have moved for summary judgment, alleging that the Plaintiffs do not have standing to argue that Initiative 300 violates the Commerce Clause; Initiative 300 does not violate the Commerce Clause; certain of the Plaintiffs do not have standing to bring a Privileges and Immunities claim; Initiative 300 does not violate the Equal Protection Clause; the Plaintiffs have failed to establish a claim under 42 U.S.C. § 1983; certain Plaintiffs lack standing to bring a claim under the ADA; and one Plaintiff's claim under the ADA lacks merit. The Plaintiffs have moved for summary judgment, alleging that Initiative 300 does violate the Commerce Clause, the ADA, the Privileges and Immunities Clause, and, as a result, the Plaintiffs' rights under 42 U.S.C. § 1983.

STANDARD OF REVIEW

Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1023 (8th Cir. 2003). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). A "genuine" issue of material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586.

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable . . . or is not significantly probative . . . summary judgment may be granted." *Id.* at 249-50 (citations omitted).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

CONSTITUTIONAL AND STATUTORY FRAMEWORK

Neb. Const. art. XII, § 8, popularly known as "Initiative 300," states, in part: "No corporation or syndicate

shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." Initiative 300 defines "farming or ranching" as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Initiative 300 provides a wide variety of exceptions to its general prohibition, including an exception for "family farm or ranch corporation[s]." *Id.* at (1)(A). A "family farm or ranch corporation" is defined as:

> a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

Id. Initiative 300 provides a similar family-limited-partnership exemption, requiring that at least one of the partners be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch. . . . " The Nebraska Supreme Court has interpreted the term "actively" to mean "constantly engaged," and the

language "engaged in the day to day labor and management" as requiring that "such person be involved on a daily or routine basis in *all* aspects of the farm or ranch activities, be it labor or management." *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 428 (Neb. 2000), emphasis added. According to the Nebraska Supreme Court, "[l]abor would encompass the physical chores attendant to the farm," and should be understood as "associated with physical activity," and meaning "'work, esp. of a hard or fatiguing kind; toil.'" *Id.* "'In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature.'" *Id.*, quoting *American Surety Co. of New York v. Stuart*, 151 S.W.2d 886, 887 (Tex.App. 1941).

The Plaintiffs allege that Initiative 300 violates the Commerce Clause of the United States Constitution, which provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States. . . . " U.S. Const. art. I, § 8, cl.3. The dormant Commerce Clause is the negative implication of the Commerce Clause, pursuant to which states may not enact laws that discriminate against or unduly burden interstate commerce. *Quill v. North Dakota*, 504 U.S. 298, 312 (1992).

Certain of the Plaintiffs also allege that Initiative 300 violates the Privileges and Immunities Clause, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," (U.S. Const. art. IV, § 2), and the Equal Protection Clause, which provides: "No State shall . . . deny to any person within its jurisdiction equal protection of the law," (U.S. Const. amend. 14, § 1).

Initiative 300 requires the Nebraska Secretary of State to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations." If the Nebraska Attorney General has reason to believe that a corporation or syndicate is violating the terms of Initiative 300, the Attorney General is required to "commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of [Initiative 300]." Consequently, the Plaintiffs brought their action, seeking declaratory and injunctive relief, against Nebraska Secretary of State John Gale and Nebraska Attorney General Jon Bruning, in their official capacities; and certain of the Plaintiffs claim that Initiative 300's alleged constitutional infirmities also give rise to a cause of action against Gale and Bruning under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Finally, two Plaintiffs allege that Initiative 300's requirement that at least one family member holding stock in a family farm or ranch limited-liability entity be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch," violates their rights under the ADA, which provides that "no qualified person with a disability shall, by reason of such

disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. These Plaintiffs contend that Initiative 300 must yield to the ADA, based on the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl.2, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

FACTS

Objections to the Evidentiary Record

Although all the Defendants and Plaintiffs have moved for summary judgment, alleging that there is no genuine issue of material fact, the parties have submitted extensive objections to each other's evidentiary records. (Defendants' Objections to Plaintiffs' Indexes of Evidence, Filings No. 80 and 89; and Plaintiffs' Objections to Defendants' Index of Evidence, Filing No. 101). In general, when an evidentiary record consists of thousands of pages of documents, giving rise to hundreds of objections, it may safely be assumed that there are genuine issues of material fact precluding summary judgment. In this case, however, the core issues are much more straightforward than the evidentiary record would indicate. As the Plaintiffs have noted, much of the documentary evidence submitted by the Defendants purports to show that Initiative 300 does not have a discriminatory effect on interstate commerce – a fact-intensive issue not pursued by the Plaintiffs in their Motion for Summary Judgment.

The hundreds of objections raised to the parties' respective evidentiary records fall into five basic categories: relevance, foundation, hearsay, conclusions of law, and improper expert testimony. I will not consider materials in the evidentiary record that are irrelevant to the issues presented in the parties' motions, nor will I consider materials that lack proper foundation, consist of inadmissible hearsay, present conclusions of law, or purport to offer expert testimony. The evidentiary materials specifically cited within this Memorandum and Order are materials that I find unobjectionable for the purpose for which they are offered, and that support a finding of fact about which there is no genuine dispute.

Undisputed Material Facts

The following facts, material to the resolution of the issues before the Court and affecting *all* Plaintiffs, are undisputed based on the statements of fact in the parties' briefs, and such facts are properly supported by the parties' indexes of evidence as referenced in the briefs.[1] Undisputed material facts specific to particular Plaintiffs will be set forth in the analysis section, below.

Initiative 300 originated as a constitutional amendment proposed through the initiative petition process and

[1] The Defendants' statement of facts is not disputed, (Defendants' Brief, Filing No. 69, pp. 7-11; Plaintiffs' Brief, Filing No. 78, p. 8). The Defendants do dispute certain portions of the Plaintiffs' statement of facts with respect to the alleged impact of Initiative 300 on the Plaintiffs' finances or business operations, and with respect to the alternatives available to the Plaintiffs under Initiative 300 to achieve their business goals. (Plaintiffs' Brief, Filing No. 83, pp. 6-17; Defendants' Brief, Filing No. 91, pp. 3-5).

appeared as a ballot question on Nebraska's 1982 general election ballot. A ballot title and explanatory statement were prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. As defined by law, the purpose of the ballot title was to express the purpose of the measure in up to one hundred words. The ballot title submitted to Nebraska voters with regard to Initiative 300, stated, in part: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" The purpose of the statement was to explain the effect of a vote for or against the measure. The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." The Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed. The Initiative process allowed a challenge by any person who was dissatisfied with the ballot title provided by the Attorney General. No challenge to the Initiative 300 ballot title was filed in the district court asking for a different title. Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution upon the issuance of a proclamation by the Governor on November 29, 1982.

ANALYSIS

I. Standing

To establish standing, a plaintiff must have suffered an injury in fact that is (1)(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) traceable to the defendant's challenged action; and (3) likely to be redressed by a favorable decision. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (hereafter "*Hazeltine II*"), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992). If a plaintiff does not show an injury that is concrete, particularized, and actual or imminent, the plaintiff lacks standing to assert a claim, and a court is without subject matter jurisdiction over such an action. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002).

Jim Jones

Plaintiff Jim Jones resides near Eddyville, Nebraska, and has been actively engaged in farming and ranching for over 40 years. To get started in his farming and ranching business in 1963, Jones entered into a business arrangement with an unrelated older farmer/rancher. In 1977, prior to the adoption of Initiative 300, the older farmer/rancher's land was transferred to a new corporation in exchange for corporate stock and Jones was allowed to purchase up to 48 per cent of the stock in the corporation, as long as the older farmer/rancher was living. Jones and his family now own all of the corporation's stock. (Complaint, Filing No. 1, ¶¶ 4, 30; Defendants' Brief, Filing No. 69, p. 9; Plaintiffs' Brief, Filing No. 78, p. 5; Declaration of Jim Jones, Filing No. A79 ("Jones Decl.") ¶¶ 2, 3, 6).

In 1988, Jones's son Gordon wanted to begin a career in farming and ranching in Nebraska by entering into a similar arrangement with an older, established farmer, but was prevented from forming such a corporation due to Initiative 300. Because Gordon could not establish a corporation with the older farmer/rancher, Jones's corporation was prevented from doing business with or merging with the corporation that Gordon could not form. (Jones Decl. ¶ 7).

Jones served as a Nebraska state senator from 1993 to 2005, and introduced legislation to provide increased opportunities for young Nebraskans wishing to begin a career in farming and ranching. The bills he proposed were met with "stiff resistance" and "killed in committee" by opponents who claimed that Jones's proposed legislation would violate Initiative 300. (Jones Decl. ¶¶ 2, 4, 8).

Jones contends that he has suffered an injury that gives him standing to challenge Initiative 300 because (1) individually[2] and as a majority shareholder in his family corporation, he cannot contract with non-qualifying out-of-state corporations for the purpose of raising and feeding livestock for slaughter, causing him loss of income; (2) farm and ranch land that Jones owns personally and as a majority shareholder in his family farm corporation has diminished in value because potential purchasers of the land are non-qualifying corporations prohibited by Initiative 300 from owning the land; (3) he cannot sell his stock in the family farm corporation to a person or entity that

[2] Jones states that he owns Nebraska farm and ranch land personally as well as through the family farm corporation. (Jones Decl. ¶ 11.)

does not qualify under Initiative 300, thus reducing the value of his corporate stock; and (4) Initiative 300 generally impedes his ability to contract, compete, borrow funds, convey assets, plan his estate, and assist younger farmers in establishing their careers. (Jones Decl. ¶¶ 9-19).

The Defendants contend that Jones lacks standing to pursue his claims because Initiative 300 does not apply to individuals and because Jones's action is not a derivative action on behalf of any corporation. It is true that third parties do not have standing to assert the rights of legal interests of others in order to obtain relief from injury to themselves. *Hazeltine II*, 340 F.3d at 591, citing *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997). Therefore, to the extent that Jones purports to make any claim on behalf of his son, his family corporation, or the younger farmers he would like to assist, Jones lacks standing to pursue such claims. Similarly, Jones's status as a former state senator who was unsuccessful in promoting certain legislation provides him with no standing to challenge Initiative 300.

Jones has also alleged, however, that *he* has suffered certain injuries that are (1)(a) concrete and particularized and (b) actual or imminent; (2) traceable to the enforcement of Initiative 300; and (3) subject to redress by a favorable decision. While Initiative 300 does not prohibit Jones from engaging in farming and ranching, it does prevent him from entering into contracts that he otherwise would enter into with out-of-state corporations for such activities as the raising and feeding of livestock for slaughter, allegedly causing Jones personal financial loss. As an individual owner of farm and ranch land, Jones allegedly has suffered a loss of real estate and business value due to Initiative 300's exclusion of potential buyers

from the market, reducing his borrowing power and prohibiting him from transferring ownership of his property as he wishes. Similarly, as a stockholder in a family farm corporation, Jones allegedly has suffered a loss of value in his stock due to Initiative 300's exclusion of potential buyers from the market, also reducing his borrowing power and prohibiting him from transferring ownership of his property – the stock –as he wishes.

The Eighth Circuit Court has made clear the fact that a plaintiff has standing to challenge the constitutionality of a law that has a negative effect on the plaintiff's borrowing power, financial strength, and fiscal planning (*Hazeltine II*, 340 F.3d at 592, citing *Clinton v. City of New York*, 524 U.S. 417, 431 (1998)), or when the law denies the plaintiff business opportunities (*id.*, citing *Lepelletier v. FDIC*, 164 F.3d 37, 42 (D.C. Cir. 1999)). I conclude that Jones has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause based on his alleged, personal injuries-in-fact.

Terrence M. Schumacher

Plaintiff Terrence M. Schumacher is a Colorado resident who owns an interest in Nebraska farmland in five counties. (Declaration of Terrence M. Schumacher, Filing No. A79 in 04cv645, Ex. 4 ("Schumacher Decl.") ¶¶ 2, 4). Neither he nor any of his relatives resides on the farmland, nor performs day-to-day labor on the land, nor manages it. (*Id.* ¶ 4). Schumacher wants to transfer his farmland to a limited liability entity to take advantage of favorable estate planning tools and to limit his exposure to personal liability, including tort liability. He also wants to

pool his Nebraska farm assets with those of his other relatives who own Nebraska farmland, to form a single, more efficient operating unit. (*Id.* ¶ 5). Initiative 300 allegedly prevents him from transferring his farmland as he wishes, reduces his borrowing power, and impairs his ability to contract and compete in a national market. (*Id.* ¶¶ 6-12). He further alleges that Nebraska residents who qualify for the family farm exemption under Initiative 300 are not similarly burdened. (*Id.* ¶¶ 10-12). I conclude that Schumacher has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause based on his alleged injuries-in-fact.

Shad Dahlgren

Plaintiff Shad Dahlgren is a Nebraska resident (Complaint, ¶ 6) who owns a minority interest in a family farm corporation that operates a cattle feedlot in Nebraska. (Affidavit of Shad Dahlgren, Filing No. A79, Ex. 6 ("Dahlgren Aff.") ¶ 2). Dahlgren is also paraplegic and permanently confined to a wheelchair. (*Id.* ¶¶ 4-5). Dahlgren contends that, as a result of his disability, he cannot perform day-to-day labor and management needed to operate the family feedlot and consequently cannot become a majority owner of the family farm corporation unless related shareholders reside on the farm or are actively engaged in its day-to-day management. (*Id.* ¶¶ 7-9). Dahlgren has desired and currently desires to purchase a row-crop farm with other investors, holding ownership in a corporation to limit his liability. (*Id.* ¶¶ 12-15). Dahlgren contends that Initiative 300 precludes him from engaging in such economic activities because his physical disability prevents him from performing day-to-day labor on the

farm, and his need for medical care prevents him from residing on the farm. (*Id.* ¶¶ 16, 18). I conclude that Dahlgren has standing to challenge Initiative 300 under the Commerce Clause, the Equal Protection Clause and the ADA.

Harold G. Rickertsen

Plaintiff Harold G. Rickertsen is a Nebraska resident who retired from farming and ranching in 2000. (Declaration of Harold G. Rickertsen, Filing No. A79, Ex. 2 ("Rickertsen Decl.") ¶ 2). He still owns his farmland as a sole proprietor, renting it to others. (*Id.*). Rickertsen wants to make use of his management experience by forming a farm corporation and transferring a minority interest in his farm to a younger, unrelated farmer, while maintaining an active management role. (*Id.* ¶¶ 9-11). Rickertsen contends that Initiative 300 has prevented him from entering into such a business relationship; reduced the number of eligible buyers for his land; limited his borrowing power; impaired his financial and estate-planning options; and restricted his access to national real estate, grain and livestock markets, because he is precluded from contracting with non-qualifying out-of-state corporate entities; all to his financial detriment. (*Id.* ¶¶ 12-15). I conclude that Rickertsen has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause, based on his alleged injuries-in-fact.

Todd Ehler

Todd Ehler is a resident of Nebraska who provided management services and periodic labor for his family's

diversified farm until 2000. (Declaration of Todd Ehler, Filing No. A79, Ex. 5 ("Ehler Decl.") ¶¶ 2-3). Ehler suffers from neuropathy in his hands, feet, and legs, as well as significant muscle loss, weakness, and loss of balance. (*Id.* ¶¶ 5-6). As a result of his physical disabilities, Ehler is unable to perform the day-to-day physical labor necessary in typical farming, ranching or feedlot operations, and cannot provide the day-to-day labor needed to operate his family's farm. (*Id.* ¶ 8). Ehler's "intended arrangement" is to form a limited liability company with a neighboring farmer through which Ehler would provide management and marketing services for the farming operation as the majority owner, and the neighbor would provide the day-to-day care and feeding of livestock as well as the labor for production of grain. (*Id.* ¶ 9). Ehler alleges that, because of the restrictions in Initiative 300 combined with his physical disabilities that prevent him from performing day-to-day farm labor, he cannot form such a limited liability corporation with a non-relative; nor can he be the sole stockholder in a farm corporation. (*Id.* ¶¶ 10-12). As a result, Ehler contends that he suffers loss of economic opportunities and benefits that are available to non-disabled individuals. (*Id.* ¶¶ 17-18). I conclude that Ehler has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause, the Equal Protection Clause, and the ADA.

Robert E. Beck, III

Plaintiff Robert E. Beck, III, ("Beck") is a cattle rancher who resides in Buffalo County, Nebraska, where he also owns a commercial cattle feeding operation. (Declaration of Robert E. Beck, III ("Beck Decl."), Filing No. 79, Ex. 3, ¶ 2). Many of his customers reside outside

Nebraska. (*Id.*). Beck wants to contract with out-of-state corporate entities and limited liability partnerships that own cattle, but alleges that Initiative 300 prohibits him from doing so. (*Id.* ¶ 3). Some of Beck's existing customers have formed limited liability entities to own feeder cattle, but such entities allegedly cannot own the cattle fed in Nebraska, due to the restrictions of Initiative 300. (*Id.*). Consequently, Beck has lost business and income, has suffered reduced borrowing power, and has been restricted from access to national cattle markets. (*Id.* ¶¶ 3-12). I conclude that Beck has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause.

II. Commerce Clause

Under the Commerce Clause, Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). "Farming or ranching" is defined in Initiative 300 as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Producing, maintaining, and adding value to such farm commodities are activities that substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 118-19 (1942) (Commerce Clause applied to production of wheat, even though production was only intended for consumption on the farm). Initiative 300 also affects other activities related to interstate commerce, by placing restrictions on the rental and sale of agricultural real

estate. The rental of real estate is "unquestionably" an activity affecting interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985). A number of courts have also recognized that the sale of real estate is an activity affecting interstate commerce, and that state laws or regulations governing the sale of real estate are subject to dormant Commerce Clause analysis, even though real estate itself is incapable of physical movement in commerce. *See, e.g., Old Coach Development Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1232 (3rd Cir. 1989); *Cranberry Hill Corp. v. Shaffer*, 629 F.Supp. 628, 630-36 (E.D.N.Y. 1986) ("An item of commerce need not cross state lines to fall within the Commerce Clause's protection if its sale . . . will have an economic impact out-of-state.") *Id., at* 631, citing *Wickard, supra.*

"A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First the court considers whether the challenged law discriminates against interstate commerce." *Hazeltine II*, 340 F.3d at 593. The Supreme Court has said, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 125 S.Ct. 1885, 1895 (2005), quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 1897, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "'When a state statute directly regulates or discriminates against interstate commerce or when its effect is to favor in-state economic interests over

out-of-state interests,'" the Supreme Court has "'generally struck down the statute without further inquiry.'" *Id.* at 1904, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). Only if a state can demonstrate that such a law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," will it withstand scrutiny under the Commerce Clause. *Id.* at 1905, citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

If a statute is not discriminatory, however, a second tier of analysis is warranted. Such a statute will be struck down under the dormant Commerce Clause only if the burden it imposes on interstate commerce is clearly excessive in relation to its putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This *Pike* balancing test need not be conducted if the statute is struck down under the first tier of analysis. *Hazeltine II*, 340 F.3d at 597 n. 9.

A. *Does Initiative 300 Discriminate Against Interstate Commerce?*

The Supreme Court has recognized three indicators of discrimination against out-of-state interests. "First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose." *Hazeltine II*, 340 F.3d at 593, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Second, "a law could facially discriminate against out-of-state interests." *Id.*, citing *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992). "Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its

purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is it could have a discriminatory effect." *Id.*, citing *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986).

The parties have stipulated that the issue of whether Initiative 300 has had a discriminatory *effect* on interstate commerce is fact-intensive and not appropriate for resolution on summary judgment. See Report of Parties' Planning Conference (Filing No. 14) ¶¶ 3, 6, 12. To the extent that evidentiary materials have been submitted purporting to show how the adoption of Initiative 300 has in fact affected interstate commerce, I have not considered such materials.[3] However, I also recognize that the three indicators of discrimination against interstate commerce are not necessarily discrete, but are often overlapping. For example, if it is patently obvious from the *language* of a law that its *effect* will be to discriminate against out-of-state interests, then it may be inferred that those who drafted, promoted, and voted to adopt the law had a discriminatory *purpose.*

1. Does Initiative 300 have a discriminatory purpose?

With respect to the *purpose* underlying the adoption of Initiative 300, the Plaintiffs refer the Court to the ballot title and explanatory statement for Initiative 300, as well

[3] As discussed, *infra*, it is also unnecessary for me to consider such materials in connection with the "*Pike* balancing test," weighing whether the burden that Initiative 300 imposes on interstate commerce is clearly excessive in relation to its putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

as testimony regarding the historical background and sequence of events leading to its adoption.

The ballot title submitted to voters said: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a *Nebraska family farm* corporation. . . . ?" (Filing No. 70-1, Ex. 1C, emphasis added). The explanatory statement presented to Nebraska voters preceding the ballot title said: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a *Nebraska family farm* corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." (*Id.*, emphasis added). There is also substantial evidence in the record that the purpose underlying Initiative 300, as expressed to voters through speeches, radio broadcasts, and news articles during the petition process and preceding the ballot vote, was to prevent the purchase of Nebraska farm and ranch land by "outside investors,"[4] and "rich out-of-state corporations."[5]

The Defendants argue that only the language of Initiative 300 itself, and its ballot title and explanatory statement, should be used to determine the purpose of the constitutional amendment. They contend that, unlike the

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[4] Deposition of Neil Oxton, Filing No. A79, Ex. 8, 40:4-17, and Depo. Exhibit 12, appearing within Exhibit 11 to Filing A79.

[5] Filing A79B, Ex. 12. (I note that Exhibit 12 at Filing A79A is the video of the I-300 Commercial-Center for Rural Affairs, while Exhibit 13 at Filing !79B is the video of the I-300 Celebration at Grand Island on December 5, 1991. There are discrepancies in the numerical references to these exhibits in the briefs.)

legislative history of a statute, the historical background of a petition initiative for a constitutional amendment is irrelevant.[6] The Eighth Circuit Court of Appeals, however, has said otherwise. *Hazeltine II,* 340 F.3d at 593-94. Following the guidance of that Court, as I must do, the "Plaintiffs have the burden of proving discriminatory purpose . . . and can look to several sources to meet that burden," including "direct evidence that the drafters of [an initiative] or the [state] populace that voted for [an initiative] intended to discriminate against out-of-state businesses." *Id.,* citing *SDDS, Inc. v. South Dakota,* 47 F.3d 263, 268 (8th Cir. 1995). While I recognize that the direct evidence of discriminatory purpose in this case may not be as strong as that in *Hazeltine II,* there is substantial evidence to support the premise that Initiative 300 was conceived and born in a protectionist fervor.[7] The ballot title and the language of Initiative 300 alone are persuasive evidence that Initiative 300 had a discriminatory purpose. The ballot title, and the language of Initiative 300 defining limited-liability-entity exemptions for family farms and ranches, clearly indicate that people living and

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[6] I recognize that when addressing challenges to Initiative 300, the Nebraska Supreme Court has said: "There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment." *Omaha Nat'l Bank v. Spire,* 389 N.W.2d 269, 279 (Neb. 1986). See also *Pig Pro Nonstock Cooperative v. Moore,* 568 N.W.2d 217, 223-24 (Neb. 1997).

[7] The historical background of Initiative 300 discloses that its adoption was the culmination of efforts to restrict Nebraska land ownership by out-of-state corporations, including Prudential Insurance Company of New Jersey, and that the debate and publicity leading to Initiative 300 was replete with protectionist rhetoric. Filing No. A79, Ex. 8-13.

working in Nebraska, and their families, will be given be favored treatment. A discriminatory purpose on the part of the drafters or voting populace, within the meaning of the dormant Commerce Clause, can be inferred from that language.

2. Does Initiative 300 facially discriminate against out-of-state interests?

When a similar state constitutional amendment was challenged in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 202 F. Supp. 2d 1020 (D.S.D. 2002) (hereafter "*Hazeltine I*"), the district court chose not to "cross the 'first tier bridge'" and instead relied "on the so-called 'second tier' approach, the *Pike v. Bruce Church, Inc.* balancing test" in finding that South Dakota's constitutional amendment was in violation of the dormant Commerce Clause. *Id.* at 1049. The Eighth Circuit Court found that the amendment in question had an underlying discriminatory *purpose,* and, therefore, did not consider whether it was discriminatory on its *face. Hazeltine II,* 340 F.2d at 593.

In *Smithfield Foods, Inc. v. Miller,* 241 F. Supp. 2d 978 (S.D. Iowa 2003) (hereafter "*Smithfield I*"), the district court considered the constitutionality of a statute that prohibited certain pork processors from owning or controlling pork production in the state, while making exceptions for certain Iowa cooperative associations with members actively engaged in farming. The district court held that the statute, on its face, discriminated against interstate commerce because it provided different treatment for in-state interests and out-of-state interests, benefitting the former and burdening the latter. *Id.* at 990. The court

noted that the statute was no less discriminatory simply because some in-state interests were burdened and some out-of-state interests were not. *Id.* at 990-91, citing *C&A Carbone, Inc. v. Clarkstown,* 511 U.S. 383, 391 (1994). The district court also concluded that the statute was enacted with a "discriminatory purpose to achieve a discriminatory effect." *Id.* at 992. Because the statute in question was amended pending appeal, it is not known whether the Eighth Circuit Court would have agreed with the district court's analysis regarding facial discrimination. *Smithfield Foods, Inc. v. Miller,* 367 F.3d 1061, 1066 (8th Cir. 2004) (hereafter "*Smithfield II*"). I agree with the court's reasoning in *Smithfield I,* recognizing facial discrimination under the dormant Commerce Clause, and I find that reasoning equally applicable to Initiative 300.[8]

The Plaintiffs' affidavits illustrate,[9] and I take notice of the fact, that businesses operating as limited liability entities may have many advantages that individual business owners do not have. These advantages may include opportunities for raising capital, obtaining financing, transferring assets, and shareholder estate planning, in addition to limited shareholder liability. I also recognize that if limited liability companies are permitted to engage in agricultural endeavors without restriction, the competition they present for traditional farmers and ranchers may lead to profound changes in a state's rural economy and

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[8] There is a danger that facial discrimination, like beauty, may lie in the eye of the beholder. It is important, therefore, for a court to describe the factors that lead it to conclude that a law *on its face* discriminates against interstate commerce.

[9] Jones Decl. ¶¶ 9-19; Schumacher Decl. ¶¶ 5-12; Dahlgren Aff. ¶¶ 12-15; Rickertson Decl. ¶¶ 12-15; Ehler Decl. ¶¶ 17-18; Beck Decl. ¶¶ 3-12.

culture. If a state places restrictions on *who* can benefit from an advantageous business arrangement, however, I am obligated to inquire whether the restrictions unfairly favor in-state economic interests.

Initiative 300's general prohibition against farming or ranching by corporations and syndicates *does not* apply to family farm or ranch corporations or limited partnerships in which at least one family member "is a person residing on or actively engaged in the day to day labor and management of the farm or ranch."[10] Initiative 300 on its face, therefore, favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them. Corporations and limited partnerships that satisfy all the requirements of a family-farm corporation or family-farm limited partnership, but do not have a family member residing on the farm or engaged in on-site day-to-day physical labor and management, cannot own farm or ranch land; nor cultivate land; nor own, keep or feed livestock in Nebraska.

Some non-Nebraska residents living across the border from their Nebraska farmland may qualify for the family farm exceptions, while some Nebraska residents living at a great distance from their farmland may not. That fact does not save Initiative 300 from facial discrimination.

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[10] A shareholder is not actively engaged in the day-to-day labor and management of the farm or ranch unless he or she is "involved on a daily or routine basis in all aspects of the farm or ranch activities, be it labor or management. Labor would encompass the physical chores attendant to the farm, and management would encompass the mental and business activities of the operation." *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 428 (Neb. 2000).

The Supreme Court has found that legislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification.[11]

Because most case law on the subject of the dormant Commerce Clause concerns movable products rather than land, Initiative 300's facial discrimination may be most readily apparent in its reference to "the ownership, keeping or feeding of animals for the production of livestock or livestock products." Initiative 300 discriminates against livestock based on origin, *i.e.*, those owned by corporations or limited partnerships that do not satisfy the Initiative 300 exemptions. Such discrimination based on origin causes a state to "isolate itself from the national economy," and constitutes facial discrimination under the dormant Commerce Clause. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353, 361 (1992).

Although the Defendants argue that Initiative 300's treatment of in-state economic interests and out-of-state

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[11] In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353 (1992), the Court struck down a statute that allowed counties to ban out-of-county waste at their landfills. In *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951), the Court struck down an ordinance that made it unlawful to sell milk as "pasteurized" unless it had been processed at a plant within a radius of five miles from the central square of Madison. In *Brimmer v. Rebman,* 138 U.S. 78 (1891), the Court struck down an inspection fee on meat from animals slaughtered more than 100 miles from the place of sale. The fact that these laws burdened some in-state interests, or included some out-of-state interests in their favored classification, did not save the laws from being facially discriminatory under the dormant Commerce Clause.

economic interests should be considered under a "discriminatory effect" analysis, necessitating a fact-intensive review, I disagree. When it is apparent from the language of a statute, or a state constitutional amendment, that its effect is to burden out-of-state economic interests and benefit in-state economic interests, the party challenging it should not be required to bear the burden of an evidentiary hearing to prove the obvious.

B. *Is Initiative 300 Nebraska's Exclusive Means of Advancing Legitimate Local Interests?*

My findings that Initiative 300 had a discriminatory purpose and facially discriminates against interstate commerce, by treating out-of-state economic interests less favorably than in-state economic interests, does not end the Commerce Clause inquiry. Subjecting Initiative 300 to the "strictest scrutiny" I may uphold its constitutionality under the Commerce Clause if the Defendants can establish that they have "'no other means to advance a legitimate local interest.'" *Smithfield II,* 367 F.3d at 1065, quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994); see also *Hazeltine II,* 340 F.3d at 596-97, citing *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392 (1994).

In attempting to address the question of whether Initiative 300 advances a legitimate local interest that can be advanced through no other means, the Defendants assert that:

> [T]he intent of Initiative 300 was to "retain and promote family farm operations in Nebraska and . . . to prevent a perceived threat that would stem from unrestricted corporate ownership of

> Nebraska farmland by preventing concentration of farmland in the hands of non-family corporations." *MSM Farms, Inc. [v. Spire]*, 927 F.2d [330] at 333 [(8th Cir. 1991)]. Some of the perceived threats included absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's land, water, and natural resources. *Id.*
>
> If the perceived threat is the ownership of farmland by corporations, there appears to be no less restrictive way to cease the ownership of farmland by corporations than an out-right prohibition. In drafting Initiative 300, it appears the drafters did not believe family farm corporations, one of the family members of which lived or worked on the farm, posed the same threats as a traditional corporation and thereby exempted Family Farm Corporations from the prohibition.

Defendants' Brief, Filing No. 69, p. 30.

The Defendants also list seven "concerns" of Nebraska citizens regarding non-family corporate ownership of farm and ranch land leading to the adoption of Initiative 300: (1) economic competition, (2) reduced stewardship of natural resources, (3) reduced participation in local government and volunteer activity, (4) vertical integration of agricultural production, (5) efficiencies of scale reducing demand for labor, (6) reduced demand for products and services from local businesses, and (7) reduced availability of land for purchase upon death or retirement of the resident owner. Defendants' Brief, Filing No. 91, p. 22.

Some of these local interests sought to be advanced by Initiative 300 are in fact protectionist interests, appearing to confirm that a discriminatory purpose motivated the

adoption of the Initiative. *Id.* Recognizing that the conservation of natural resources and the promotion of rural economic development are legitimate local interests,[12] the next question is whether such interests can be advanced through no other means. For example, if the drafters' concern was conservation of natural resources, one might question whether environmental regulations were considered as a less drastic and perhaps more effective alternative. If the drafters' concern was the potential abuse of limited liability status, one might question whether mandatory liability insurance was considered as a less drastic and perhaps more effective alternative. If the drafters' concern was the promotion of local economic development, one might question whether requiring family farm and ranch limited-liability entities to hire resident managers or to lease to qualified tenants was considered as a less drastic and perhaps more effective alternative.

As in *Hazeltine I* and *Hazeltine II*, there is no evidence that the drafters of Initiative 300 made any attempt to measure its probable effects or the probable effects of less drastic alternatives. See *Hazeltine II,* 340 F.3d at 595. The Defendants, therefore, have not met their burden of proving that Initiative 300 is the exclusive means of advancing legitimate local interests.

III. Privileges and Immunities Clause

Under the Privileges and Immunities Clause, citizens have a right to be free from discrimination based on their state of citizenship or residence. That right, however, is not absolute. For example, the Privileges and Immunities

[12] *MSM Farms, Inc. v. Spire,* 927 F.2d 330, 333 (8th Cir. 1991).

Clause provides protection for non-residents in the areas of procuring medical services and engaging in commercial activity, but does not prevent a state from requiring non-residents to pay more for hunting licenses or tuition at state universities. *Saenz v. Roe,* 526 U.S. 489, 502 (1999). Similarly, the Privileges and Immunities Clause prevents states from imposing unreasonable burdens on citizens of other states in their pursuit of employment, their ownership and disposition of private property within the state, and their access to the courts, but *not* in areas of voting and qualification for public office. *Baldwin v. Fish and Game Comm'n of Montana,* 436 U.S. 371, 383 (1978).

Schumacher argues that "[b]ecause of his residency, he is precluded from performing the day to day labor and management of the farmland that he owns in Nebraska." (Plaintiffs' Brief, Filing No. 83, p. 55[13]). He also alleges that he cannot qualify for the exemptions from Initiative 300's restrictions "based on his residency and the residency of members of his family." (*Id.* at 59). He contends that Initiative 300's restrictions implicate fundamental rights, because they affect his ability to do business and pursue a common calling.[14] It is not his Colorado residency or citizenship that precludes him from performing day-to-day labor on his Nebraska farmland, however, but his physical location and the physical location of his family members. As the Defendants note, the same restriction is

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[13] Page references are to the CM/ECF document, not internal pagination.

[14] See *United Building and Construction Trades Council v. Camden,* 465 U.S. 208, 219 (1984).

imposed on Nebraska citizens or residents who do not live within commuting distance of their farmland.[15]

If a state law discriminates against an out-of-state citizen based on his or her citizenship or residency, then a court must inquire (1) whether the law burdens a privilege and immunity protected by the clause, and if so, (2) whether there is substantial reason for discrimination against citizens of the other state. *United Building and Construction Trades Council v. Camden,* 465 U.S. 208, 218 (1984). Initiative 300 does not discriminate against Schumacher as an individual based on his citizenship or residency, although it does discriminate against *out-of-state economic interests.* Because Schumacher has not suffered discrimination because of his citizenship or residency, past or present, his Privileges-and-Immunities claim must fail.

IV. Equal Protection Clause

The Defendants have moved for summary judgment on the Plaintiffs' Equal Protection claim, citing *MSM Farms, Inc.,* 927 F.2d at 332, and arguing that it is settled law in the Eighth Circuit that Initiative 300 does not violate the Equal Protection Clause. The Plaintiffs have

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[15] I recognize that a law discriminating against in-state residents as well as out-of-state residents may violate the Privileges and Immunities Clause. In *Camden,* 465 U.S. at 217-18, the Supreme Court found that a city ordinance giving employment preference to city residents violated the Privileges and Immunities Clause, even though it discriminated against certain in-state residents as well as all out-of-state residents. It is doubtful that the Supreme Court would have reached the same result if the ordinance had simply required city employees or contract workers, whatever their residence or citizenship might be, *to appear for work* in the city of Camden.

not moved for summary judgment on their Equal Protection Claim, but assert that the classifications challenged in this action are different from the classifications challenged in *MSM Farms,* and that the Defendants' motion should be denied because genuine issues of material fact remain.

In *MSM Farms,* the Eighth Circuit Court noted that Initiative 300 involved no suspect classifications or fundamental rights, and therefore its varying treatment of different groups or persons did not violate the Equal Protection Clause unless such treatment was so unrelated to the achievement of any legitimate purposes that it must be viewed as irrational. *Id.* at 332. It is true that the Court in *MSM Farms* was considering Initiative 300's differing treatment of family farm corporations and non-family farm corporations. The Court said: "Whether *in fact* the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land." *Id.* at 333 (emphasis in original). Here, the Plaintiffs contend that the challenged classification concerns family farm corporations *with* resident farmers *vis a vis* family farm corporations *without* resident farmers.

Although the challenged classification in this case is somewhat different than that in *MSM Farms,* many of the factors that the Eighth Circuit accepted as forming a rational basis for Initiative 300's disparate treatment of family corporations and non-family corporations are equally applicable here. Favoring resident family farm corporations over non-resident family farm corporations may be said to "protect an agriculture where families own

and work the land." *Id.* (emphasis added). Favoring resident family farm corporations may also prevent "absentee landowners and tenant operation of farms [that] would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources." *Id.*

While I find that resident family farm corporations and non-resident family farm corporations are similarly situated for purposes of owning and operating farms and ranches in the state of Nebraska, I also find that there are rational bases for the disparate treatment of the two classes.[16] Accordingly, I conclude that Initiative 300 does not violate the Equal Protection Clause and that the Defendants are entitled to summary judgment as a matter of law on the Plaintiffs' Equal Protection claim.

V. 42 U.S.C. § 1983

Because I have found that the Defendants, acting under color of state law, have denied the Plaintiffs rights secured to them under the Commerce Clause of the United States Constitution, the Plaintiffs are entitled to judgment against the Defendants in their official capacities under 42 U.S.C. § 1983, including prospective injunctive relief, and may apply for attorneys' fees under 42 U.S.C. § 1988.

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[16] Neither in this Equal Protection analysis, nor in my analysis under any other provision of the United States Constitution or federal law, am I in any way passing judgment on the public-policy merits of Initiative 300. I recognize that a myriad of public-policy arguments can be made in favor of and in opposition to Initiative 300.

VI. ADA

Title II of the ADA provides, in part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Public entity" is defined to include "any State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B). "Qualified person with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The ADA's reference to "programs, services, or activities" of a public entity has been construed broadly, to apply to all activities of state and local governments, including the adoption of standards for real estate zoning. *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 44-45 (2nd Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 730 (9th Cir. 1999).

A plaintiff may bring a claim in federal court alleging violations of the ADA and seeking prospective injunctive relief against state officials in their official capacities. *See Randolph v. Rodgers,* 253 F.3d 342, 347-48 (8th Cir. 2001); *Gibson v. Ark. Dep't of Corr.,* 265 F.3d 718, 722 (8th Cir. 2001); *Grey v. Wilburn,* 270 F.3d 607, 609 (8th Cir. 2001).

Plaintiffs Dahlgren and Ehler are disabled[17] and, because of their disabilities, cannot perform daily physical labor on farms or feedlots.[18] Dahlgren cannot live on a farm or at a feedlot, due to his need for access to medical care. Although Ehler does not allege that his disability prevents him from living on his family farm, he is employed at a different location in a business that accommodates his physical disabilities. (Ehler Decl. ¶ 7). Ehler, therefore, faces the option of living idly on his farm where he cannot engage in productive labor, or maintaining gainful employment that accommodates his disability at a location removed from the farm. Dahlgren and Ehler, therefore, cannot work on farms or at feedlots due to their physical disabilities, and they cannot live on their farms without sacrificing their health and/or their livelihoods.

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[17] An individual is considered disabled under the ADA if he or she (1) suffers from a physical or mental impairment, that (2) affects a major life activity; and (3) the effect is substantial. *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998). The impairment's impact must also be "permanent or long-term." *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 198 (2002). "Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii); 24 C.F.R. § 100.201(b).

[18] As discussed, *supra,* the Nebraska Supreme Court has interpreted the language of Initiative 300, providing an exemption for family farm and ranch limited liability entities, as requiring that "a person . . . actively engaged in the day to day labor and management of the farm or ranch" be "involved on a daily or routine basis in *all* aspects of the farm or ranch activities, be it labor or management." *Hall v. Progress Pig, Inc.,* 610 N.W.2d 420, 428 (Neb. 2000), emphasis added. The Nebraska Supreme Court has interpreted the term "labor" as "associated with physical activity," and meaning " 'work, esp. of a hard or fatiguing kind; toil.' " *Id.* " 'In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature.' " *Id.,* quoting *American Surety Co. of New York v. Stuart,* 151 S.W.2d 886, 887 (Tex. App. 1941).

The facially-neutral standards in Initiative 300 have a disparate impact on Dahlgren and Ehler, due to their disabilities. Specifically, Initiative 300 denies Dahlgren and Ehler the benefits of owning agricultural property in limited liability companies, as a result of their disabilities. Non-disabled farm owners who can live on their farms or engage in daily physical labor on their farms are not so precluded. Dahlgren and Ehler are "qualified individual[s] with a disability," under the ADA, because each is qualified to own farmland in a limited liability company, *but for* Initiative 300's prohibition. Each, by reason of his disability, has been excluded from participation in or otherwise denied the benefits of such an ownership arrangement, and thereby suffered discrimination through the application of Initiative 300.[19]

If this were a case brought under the ADA to challenge a rule, policy or practice, one might inquire whether the Plaintiffs had requested "reasonable modifications" to accommodate their disabilities under 42 U.S.C. § 12131(2). A reasonable accommodation of the Plaintiffs' disabilities might be to require that they lease their property to a qualified person, or employ such a person to reside on the property to perform day-to-day labor and management. Because it is not a mere policy or practice that is challenged, however, but a provision in the Nebraska Constitution, it is fruitless for the Plaintiffs to request an accommodation that the Defendants cannot grant.

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[19] The U.S. District Court for the District of South Dakota reached the same conclusion with respect to ADA challenges to the nearly-identical South Dakota constitutional amendment. *South Dakota Farm Bureau, Inc. v. Hazeltine,* 202 F. Supp. 2d 1020, 1039-43 (2002), rev'd on procedural grounds, *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583, 589-91 (8th Cir. 2003).

State laws and constitutional provisions are preempted by federal law when it is impossible to comply with both, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *South Dakota Min. Ass'n Inc. v. Lawrence County,* 155 F.3d 1005, 1009 (8th Cir. 1998), citing *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581 (1987). Because Initiative 300 conflicts with the ADA and stands as an obstacle to the accomplishment of Congress's purposes in enacting the ADA, Initiative 300 is invalid under the Supremacy Clause of the United States Constitution. As prevailing parties under their ADA claim, Dahlgren and Ehler may apply for reasonable attorneys fees under 42 U.S.C. § 12205.

VII. Severance

Twenty-six words, stated twice within Initiative 300, gave rise to the Plaintiffs' challenge, and to this Court's conclusion that Initiative 300 does violate certain of the Plaintiffs' rights. Those words, that help define the exemptions for family-farm limited partnerships and family-farm corporations, are: "*at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch . . . .* " The final question this Court must address is whether those words or some other discrete portion of Initiative 300 can be severed to preserve the remainder.

The Nebraska Supreme Court has used a five-part test to determine whether an unconstitutional portion of a *statute* can be severed to preserve the valid portions. That court considers:

> (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Jaksha v. State, 486 N.W.2d 858, 873 (1992).

Where an initiative for an amendment to the state constitution is concerned, however, the Nebraska Supreme Court has said that the constitutional parts of the initiative "may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining amendments." *Duggan v. Beermann,* 544 N.W.2d 68, 79-80 (Neb. 1996). "Where the expressed ... intent is not severable, the inducement cannot be anything less than entire." *Id.,* citing *Fitzgerald v. Kuppinger,* 79 N.W.2d 547, 554 (1956).

Initiative 300 could well provide a workable plan, independently enforceable, if the 26 words at issue were stricken. Corporations and syndicates would be prohibited from engaging in farming or ranching in Nebraska, with exceptions made for family-farm corporations and limited partnerships. Initiative 300 has no severance clause, however, and I cannot conclude that the residency or day-to-day-labor-and-management provisions in the family-farm exemptions were not an inducement to the passage of Initiative 300. To the contrary, based on the record before the Court, it appears that those provisions *were* an

inducement to the passage of Initiative 300 and that it would do violence to the intent of the voters to sever those provisions. Because the unconstitutional portions are intertwined with the valid portions, Initiative 300 must be declared unconstitutional in its entirety.

CONCLUSION

Initiative 300 does not violate the Equal Protection Clause or the Privileges and Immunities Clause, but does violate the dormant Commerce Clause and the ADA, causing the Plaintiffs to be prevailing parties under 42 U.S.C. § 1983. The foregoing order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, the United States Court of Appeals for the Eighth Circuit may, in its discretion, permit an appeal to be taken from this order if application is made to it within ten days after the entry of the order. (28 U.S.C. § 1292(b)).

IT IS ORDERED:

1. The Defendants' Objection to Index (Filing No. 80) is denied;

2. The Defendants' Objection to Index (Filing No. 89) is denied;

3. The Plaintiffs' Objection to Index (Filing No. 101) is denied;

4. The Defendants' Motion for Summary Judgment (Filing No. 68, Case No. 8:04cv645) is granted with respect to Count II of the Complaint, alleging a violation of the Privileges and Immunities Clause; Count III of the Complaint, alleging a

violation of the Equal Protection Clause; and denied in all other respects;

5. The Plaintiffs' Motion for Summary Judgment (Filing No. 82, Case No. 8:04cv645) is granted with respect to Count I of the Complaint, alleging a violation of the Commerce Clause; Count IV, alleging a deprivation of constitutional rights under 42 U.S.C. § 1983; and Count V, alleging a violation of Americans with Disabilities Act; and denied in all other respects;

6. Any party may apply to the United States Court of Appeals for the Eighth Circuit for permission to pursue an interlocutory appeal within ten days of the date of this order;

7. Absent a timely application for interlocutory appeal, a separate Declaratory Judgment will be entered in favor of the Plaintiffs on Counts I, IV and V; a permanent injunction will issue, enjoining the Defendants from enforcing Initiative 300; and a schedule will be established for the Plaintiffs' application for attorneys' fees as permitted by 42 U.S.C. §§ 1983, 1988 and 12205.

Dated this 15th day of December, 2005.

BY THE COURT:

s/ Laurie Smith Camp
United States District Judge

Art. XII

CONSTITUTION OF THE STATE OF NEBRASKA

Sec. 8. Corporation acquiring an interest in real estate used for farming or ranching or engaging in farming or ranching; restrictions; Secretary of State, Attorney General; duties; Legislature; powers. That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

Sec. 8(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.

Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.

Syndicate shall mean any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day

labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships.

These restrictions shall not apply to:

(A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stock-holders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

These restrictions shall not apply to:

(B) Non-profit corporations.

These restrictions shall not apply to:

(C) Nebraska Indian tribal corporations.

These restrictions shall not apply to:

(D) Agricultural land, which, as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or

under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For the purposes of this exemption, land purchased on a contract signed as of the effective date of this amendment, shall be considered as owned on the effective date of this amendment.

These restrictions shall not apply to:

(E) A farm or ranch operated for research or experimental purposes, if any commercial sales from such farm or ranch are only incidental to the research or experimental objectives of the corporation or syndicate.

These restrictions shall not apply to:

(F) Agricultural land operated by a corporation for the purpose of raising poultry.

These restrictions shall not apply to:

(G) Land leased by alfalfa processors for the production of alfalfa.

These restrictions shall not apply to:

(H) Agricultural land operated for the purpose of growing seed, nursery plants, or sod.

These restrictions shall not apply to:

(I) Mineral rights on agricultural land.

These restrictions shall not apply to:

(J) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential use for nonfarming or nonranching purposes. A corporation or syndicate may hold such agricultural land in such acreage

as may be necessary to its nonfarm or nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, not to exceed a period of five years, such land may not be used for farming or ranching except under lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(K) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of, except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(L) A bona fide encumbrance taken for purposes of security.

These restrictions shall not apply to:

(M) Custom spraying, fertilizing, or harvesting.

These restrictions shall not apply to:

(N) Livestock futures contracts, livestock purchased for slaughter, or livestock purchased and resold within two weeks.

If a family farm corporation, which has qualified under all the requirements of a family farm or ranch corporation, ceases to meet the defined criteria, it shall

have fifty years, if the ownership of the majority of the stock of such corporation continues to be held by persons related to one another within the fourth degree of kindred or their spouses, and their landholdings are not increased, to either re-qualify as a family farm corporation or dissolve and return to personal ownership.

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence art action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment, Nebraska citizens and entities shall have standing in district court to seek enforcement.

The Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSON; TODD EHLER; and ROBERT E. BECK III Plaintiffs, v. JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska Defendants.	Case No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

(Filed: 12/30/2004)

Plaintiffs state as follows:

NATURE OF ACTION

1. This action challenges the validity of Article XII, § 8 of the Nebraska Constitution under the United States Constitution and the Americans with Disabilities Act.

2. Article XII, § 8 of the Nebraska Constitution is commonly known as "Initiative 300" due to its origination as Initiative Measure 300.

3. Initiative 300 provides, in part; "No corporation or syndicate shall acquire, or otherwise obtain an interest,

whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching."

PARTIES

4. Plaintiff Jim Jones ("Jones") is an individual who resides at rural Eddyville, Nebraska. Jones is a rancher and a former Nebraska State Senator. Prior to 1982, Jones began his career as a farmer/rancher through forming a corporation with an older, established farmer. Jones has introduced and supported legislation in the Nebraska Legislature seeking to amend Nebraska law to provide increased opportunity for young Nebraskans to get started in farming and ranching.

5. Plaintiff Terrence M. Schumacher ("Schumacher") is a resident of Boulder, Colorado. Schumacher has an ownership interest in Nebraska farmland, some of which was originally purchased by his father.

6. Plaintiff Shad Dahlgren ("Dahlgren") is a resident of Lincoln, Nebraska. He owns a minority interest in a family farm corporation which operates a cattle feedlot located near Bertrand, Nebraska.

7. Plaintiff Harold G. Rickertsen ("Rickertsen") is an individual who resides in rural St. Paul, Nebraska.

8. Plaintiff Todd Ehler ("Ehler") is an individual who resides in Elkhorn, Nebraska. Ehler has been actively involved with a third generation family farm with his father. He has a disability as defined in the Americans with Disabilities Act.

9. Plaintiff Robert E. Beck III ("Beck") is an individual who resides in rural Kearney, Nebraska. Beck owns a commercial cattle feeding operation.

10. Defendant John Gale ("Secretary of State") is the Secretary of State of the State of Nebraska. Defendant Secretary of State is required to participate in the enforcement of Initiative 300. Specifically, the Secretary of State is required by Neb. Const. art. XII, § 8 to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and to notify the Attorney General of any possible violations."

11. Defendant Jon Bruning ("Attorney General") is the Attorney General of the State of Nebraska. Defendant Attorney General is authorized by Neb. Const. art. XII, § 8 to "commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of "Initiative 300."

JURISDICTION

12. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202. This action arises under the Constitution and laws of the United States. Plaintiffs seek a declaration that Initiative 300 (Neb. Const. art. XII, § 8) violates the Commerce Clause of the U.S. Constitution (Art. I, § 8); the Privileges and Immunities Clause of the U.S. Constitution (Art. IV, § 2); the Equal Protection Clause of the U.S. Constitution (Amend. XIV); 42 U.S.C. § 1983; and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213. Plaintiffs also request a permanent injunction prohibiting

enforcement of Initiative 300, as well as other appropriate relief, including attorneys' fees under 42 U.S.C. §§ 1988 and 12205.

VENUE

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1), as all the Defendants reside in the State of Nebraska or have an interest in property in the State of Nebraska. Venue is also proper in this district under 28 U.S.C. § 1391(b)(2) as the events giving rise to the claim occurred in this district and the property involved is located in this district.

BACKGROUND

Initiative 300

14. Article XII, § 8 of the Nebraska Constitution (hereafter "Initiative 300") originated as a constitutional amendment proposed through the initiative petition process. Initiative 300 appeared as a ballot question on the general election ballot in 1982.

15. In accordance with Nebraska law, a "ballot title" was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State.

16. The purpose of a ballot title under Nebraska law is to "express the purpose of the measure" in up to one hundred words.

17. The ballot title submitted to Nebraska voters with regard to Initiative 300 stated as follows: "Shall a constitutional prohibition be created prohibiting ownership of

Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?"

18. In accordance with Nebraska law an explanatory statement for Initiative 300 was also prepared by the Attorney General for placement on the official ballot, in italics, immediately preceding the ballot title.

19. The purpose of an explanatory statement under Nebraska law is to "explain the effect of a vote for and against the measure."

20. The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land."

21. In accordance with Nebraska law, the Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election.

22. Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed.

23. At the time of Initiative 300's adoption in 1982, as today, Nebraska law provides a statutory process for any person who is dissatisfied with the ballot title provided by the Attorney General under which such person

may challenge the ballot title by filing a petition in the district court asking for a different title.

24. No legal challenge was filed to the ballot title for Initiative 300.

25. Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution on November 29, 1982 upon issuance of a proclamation by the Governor.

26. Initiative 300 generally prohibits corporations, limited partnerships, limited liability partnerships, partnerships with corporate members and similar business entities from owning Nebraska farm or ranch land or engaging in farming or ranching in the state of Nebraska. Initiative 300 defines farming and ranching as "the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping or feeding of animals for the production of livestock or livestock products."

27. Complete exemptions from Initiative 300's prohibitions concerning farming and ranching are provided to certain types of business entities including "family farm or ranch corporations," non-profit corporations, and Nebraska Indian tribal corporations.

28. Those entities which are not exempted from Initiative 300 are provided a number of exceptions to the ban on owning farm land or engaging in farming or ranching. These include exceptions for poultry production, alfalfa production on land leased by alfalfa processors, seed production, nursery plant production, sod production, research and experimental farming, holding of land for non-farm use for up to five years, custom spraying, custom

fertilizing, custom harvesting, livestock futures contracts, livestock purchased for slaughter, and livestock purchased and resold within two weeks.

29. An exemption from the farming ban is also provided for a fifty year period for a "family farm corporation" which ceases to meet the criteria for qualification as a family farm corporation. The exemption requires that majority ownership remain within the family, and the corporation may not increase its landholdings. A "grandfather" clause is also provided for land that was being used for farming by a corporation or syndicate as of the date of enactment of Initiative 300, provided that such land is held in continuous ownership by the same corporation or syndicate.

The Impact of Initiative 300 on the Plaintiffs

30. Plaintiff Jones has been actively engaged in farming and ranching in Nebraska for over forty years. From 1993 until January 2005 he also served as a Nebraska State Senator from the 43rd district, which covers 13 counties in the Nebraska Sandhills. Jones moved to Custer County Nebraska in 1963. He was able to get started in farming and ranching there by entering into an agreement with an unrelated older farmer/rancher in which he received fifty percent (50%) of the revenues. Jones provided his labor and the older farmer provided the land. In 1977 the two men formed a corporation and entered an agreement wherein Jones could purchase stock in the corporation each year, up to a maximum of forty-eight percent ownership (48%), so long as the older shareholder was living. In 1994, Jones purchased the remaining balance of the shares on contract. Jones and his family

now own all of the corporation's stock. This stock can be passed down to Jones' heirs. Initiative 300 precluded Jones from using this same business practice to help a younger farmer become established.

31. One of Jones' sons wanted to become established in farming through a similar arrangement with an older established farmer. However, he was prevented from forming this corporation by Initiative 300. The land in question was then sold, and the young potential farmer was shut out of starting a farming operation. As a state Senator, Jones introduced bills in the Nebraska Legislature to address such situations in order to provide young Nebraska farmers and ranchers increased opportunity to choose farming and ranching as a career. Jones bills were killed in committee, and opponents claimed the proposed legislation violated Initiative 300.

32. Plaintiff Schumacher is a resident of Boulder, Colorado. Schumacher has an ownership interest in Nebraska farmland that was originally purchased by his father. He desires to form a family limited partnership and transfer the farmland to this entity for improved management of the land, estate planning, and to better limit risk to the landowners, including Schumacher. However, pursuant to Initiative 300, Schumacher is prohibited from transferring the property to a family limited partnership because neither he nor any other family members reside on the farm land.

33. Plaintiff Schumacher's employment does not allow for him to live on the farmland, and he does not live close enough to the land to perform day to day labor and management.

34. Plaintiff Dahlgren owns a minority interest in a family farm corporation which operates a cattle feedlot located near Bertrand, Nebraska. Dahlgren was involved in an automobile accident at the age of 16. As a result of the accident, Dahlgren is a paraplegic which is a disability as defined by the ADA. Dahlgren's disability restricts him from performing the day to day labor necessary for the family farm corporation to operate its cattle feedlot. Due to Dahlgren's inability to provide the day to day labor necessary to operate the cattle feedlot, Initiative 300 prohibits Dahlgren from ever owning a majority interest in the family farm corporation, solely on the basis of his disability, unless he resides at the location of the cattle feedlot.

35. Plaintiff Rickertsen is an individual who resides in rural St. Paul, Nebraska. Upon his retirement he wanted to form a corporation with a young area farmer, but was prevented by Initiative 300 from doing so.

36. Plaintiff Ehler is an individual who resides in Elkhorn, Nebraska. Ehler has been actively involved with a third generation family farm with his father. He has a disability under the Americans with Disabilities Act. Ehler's disability restricts his ability to provide day to day labor on the family farm. Upon Ehler's father's retirement, Ehler would like to form a corporation with a neighboring farmer which would permit Ehler to continue to own and receive income off the farm. However, Initiative 300 prohibits Ehler from forming a corporation with his neighboring farmer who is not a family member.

37. Plaintiff Beck owns a commercial cattle feeding operation. He desires to engage in interstate commerce with non-resident customers. However, Initiative 300 prohibits Beck from conducting business with potential

customers in other states who wish to own cattle under a corporate entity or other "syndicate" (business entities) restricted by Initiative 300.

38. Enforcement of Initiative 300 by the Defendants will cause irreparable harm to the Plaintiffs for which no adequate remedy at law exists.

Count I

Initiative 300 Violates the Commerce Clause of the United States Constitution.

39. Plaintiffs re-allege paragraphs 1-38 of this Complaint as if fully set forth herein.

40. This Count seeks a declaration that Initiative 300 violates the Commerce Clause of the United States Constitution, (Art. I, § 8, cl. 3), and an injunction prohibiting enforcement of Initiative 300.

41. Initiative 300 was the model for South Dakota's Amendment E. Amendment E was held to violate the Commerce Clause by the United States Court of Appeals for the Eighth Circuit.

42. Initiative 300 purposefully discriminates against out-of-state interests, including out-of-state entities and individuals who transact business with the Plaintiffs.

43. The history of Initiative 300 demonstrates that it was motivated by economic protectionism and animus toward out-of-state businesses. The drafters of Initiative 300 intended to purposefully discriminate against out-of-state interests that wanted to do business in Nebraska. The drafters intended to ban farming in Nebraska by

out-of-state corporations and "syndicates" in order to protect perceived local interests.

44. Initiative 300 is facially discriminatory against interstate commerce. Only those persons who reside in Nebraska themselves or have family members residing in Nebraska may own a controlling interest in a corporation engaged in farming, ranching or ownerships of livestock in Nebraska. This limitation arises because Initiative 300 imposes qualifications for family farm corporate status that can be satisfied only when a family member resides on or provides day to day labor and management in Nebraska.

45. Initiative 300 is facially discriminatory against out-of-state Indian tribal corporations. Initiative 300 exempts "Nebraska Indian tribal corporations" but prohibits its ownership of farm land or livestock by out-of-state Indian tribal corporations.

46. The plain language of Initiative 300 evidences an intent and purpose to prohibit absentee ownership and operation of farm and ranch land by corporate entities.

47. The plain language of Initiative 300 requires a shareholder of a family farm corporation to either reside on the farm property or participate in the physical labor attendant to the farm on a daily basis.

48. Initiative 300 facially discriminates against out-of-state commence by imposing greater burdens on out-of-state residents.

49. Initiative 300 creates a disparate impact on out-of-state residents and on interstate commerce by its plain language, its purpose and its effect, due to the residency

and daily labor requirement for qualification as a family farm corporation.

50. The burden which Initiative 300 imposes in interstate commerce is excessive in relation to its putative local benefits.

51. The discriminatory effect of Initiative 300 is to unlawfully burden interstate commerce.

Count II

Initiative 300 Violates the Privileges and Immunities Clause of the U.S. Constitution.

52. Plaintiffs reallege Paragraphs 1-38 of this Complaint as if fully set forth herein.

53. This Count seeks a declaration that Initiative 300 violates the Privileges and Immunities Clause of Art. IV, § 2 of the U.S. Constitution, and an injunction prohibiting enforcement of Initiative 300.

54. Plaintiff Schumacher is an individual citizen of the state of Colorado and is not a resident of Nebraska.

55. Plaintiff Schumacher is not related to a person residing on or actively engaged in the day to day labor and management of a farm or ranch located in Nebraska.

56. Plaintiff Schumacher's occupation, activities and investments constitute a business activity or "common calling" protected by Art. IV, § 2 of the U.S. Constitution against discrimination or unequal treatment by Defendants.

57. Although Art. XII, § 8(A) of the Constitution of the State of Nebraska provides a "family farm or ranch

corporation" exception to Initiative 300's prohibition against corporate or syndicate farming or ranching in Nebraska, Initiative 300 on its face and in effect prohibits Plaintiff Schumacher, and other non-residents of the state of Nebraska, from qualifying for this exception and the remaining exceptions thereunder.

58. The plain language, effect, and enforcement of Initiative 300 discriminates against Plaintiff Schumacher, and other non-residents of the state of Nebraska, on the basis of his citizenship or residency in violation of Art. IV, § 2 of the Constitution.

59. The exceptions to Initiative 300's general prohibition against corporate or syndicate farming or ranching in Nebraska grant privileges to residents of the state of Nebraska not available to Plaintiff Schumacher, and other non-residents of Nebraska, on the basis of his citizenship or residency in violation of Art. IV, § 2 of the U.S. Constitution.

60. Initiative 300 unconstitutionally differentiates between residents of Nebraska and non-residents of Nebraska and deprives Plaintiff Schumacher of the same privileges enjoyed by the residents of Nebraska in violation of Art. IV, § 2 of the U.S. Constitution.

61. An actual controversy exists between Plaintiff Schumacher and Defendants as to the constitutionality of Initiative 300.

Count III

Initiative 300 Violates the Equal Protection Clause of the Fourteenth Amendment.

62. Plaintiffs reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

63. This Count seeks a declaration that Initiative 300 violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the Untied States. It also seeks an injunction prohibiting enforcement of Initiative 300.

64. Initiative 300, on its face and in its purpose and effect, treats similarly situated individuals differently, affording to some corporations, syndicates and other persons the opportunity to farm and own livestock in Nebraska, while denying this opportunity to others.

65. Initiative 300 discriminates against non-resident family corporations.

66. The classifications in Initiative 300 have no substantial relationship to an important government interest and bear no rational relationship to a legitimate governmental end.

67. The Plaintiffs' ability to enter into business with non-resident family corporations and/or to form such entities for farming purposes is restricted by Initiative 300.

68. Plaintiffs are accorded unfavorable treatment under the classifications contained in Initiative 300.

69. Initiative 300 denies Plaintiffs equal protection of the law in violation of the Equal Protection Clause.

70. An actual controversy exists between the parties as to the constitutionality of Initiative 300.

71. The particular classifications in Initiative 300 challenged in this Count have not previously been adjudicated in any reported decision.

Count IV

Initiative 300 Deprives Plaintiffs of Rights Guaranteed Under the U.S. Constitution in Violation of 42 U.S.C. § 1983.

72. Plaintiffs reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

73. This Count is brought by Plaintiffs pursuant to 42 U.S.C. §§ 1983 and 1988, against the Secretary of State and Attorney General in their official capacities, and seeks a declaration that Initiative 300 deprives Plaintiffs of rights guaranteed by the United States Constitution. It also seeks prospective injunctive relief restraining the enforcement of Initiative 300.

74. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

75. The Commerce Clause, the Privileges and Immunities Clause of Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution confer rights, privileges, or immunities within the meaning of 42 U.S.C. § 1983.

76. As more fully alleged above, the Secretary of State and Attorney General, by virtue of their constitutional duties under Initiative 300, are denying Plaintiffs rights secured by the Commerce Clause, Privileges and Immunities Clause, and the Equal Protection Clause. In so doing, the Secretary of State and the Attorney General are acting under color of law.

77. An actual controversy exists between the parties as to the constitutionality of Initiative 300.

Count V

Initiative 300 Violates the Americans with Disabilities Act.

78. Plaintiffs Ehler and Dahlgren reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

79. This Count seeks a declaration that Initiative 300 violates the ADA, 42 U.S.C. § 12101-12213, and an injunction against enforcement of Initiative 300.

80. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. Title II is a catch-all provision that prohibits all discrimination by a public entity,

regardless of the context. Title II applies to anything a public entity does.

81. Defendants are "public entities" under 42 U.S.C. § 12131 and are responsible for administering and enforcing Initiative 300.

82. Initiative 300 requires that at least one of the family members of the family farm corporation "reside on or be actively engaged in the day-to-day labor and management of the farm." Neb. Const. Art. XII, § 8. The Nebraska Supreme Court has held this provision requires participation in the physical labor attendant to the farm or ranch on a daily basis.

83. Initiative 300 discriminates on its face against disabled persons who cannot satisfy the day to day labor qualification. These disabled farmers are discriminated against because, solely as a result of their disabilities, they are deprived of the opportunity to own a majority interest of a family farm corporation or syndicate without residing on the farm. This opportunity is available to non-disabled persons.

84. Initiative 300 is a state constitutional provision which conflicts with federal law. Thus, Initiative 300 is preempted under the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2.

85. Initiative 300 actually conflicts with federal law, since it is impossible for the State of Nebraska to comply with both Initiative 300 and the ADA. In addition, Initiative 300 stands as an obstacle to the full purposes and objectives of Congress.

86. An actual controversy exists between the parties as to whether Initiative 300 violates the ADA.

WHEREFORE, Plaintiffs request this Court to render judgment on this Complaint in their favor and grant the following relief:

A. Declare that Initiative 300 interferes with interstate commerce in violation of the Commerce Clause of the United States Constitution;

B. Declare that Initiative 300 violates the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution;

C. Declare that Initiative 300 deprives Plaintiffs of the equal protection of the law in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

D. Declare that the Secretary of State and Attorney General, by virtue of fulfilling the duties of their offices under Initiative 300, are depriving Plaintiffs of their rights under the Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause in violation of 42 U.S.C. § 1983;

E. Declare that Initiative 300 violates the Americans with Disabilities Act;

F. Enter an order permanently enjoining the Defendants from enforcing, or taking any steps to enforce, Initiative 300;

G. Award Plaintiffs their costs incurred in this action, including reasonable attorneys' fees, as permitted by 42 U.S.C. §§ 1983, 1988, and 12205; and

H. Grant Plaintiffs such additional and further relief as this Court deems just and proper.

DATED this 30th day of December, 2004.

Respectfully submitted,

JIM JONES, TERRENCE M. SCHUMACHER; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III, Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,	)	
	)	
Plaintiffs,	)	**Case No. 8:04CV645**
v.	)	**DECLARATION OF**
JOHN GALE, et al.,	)	**NEIL OXTON**
	)	
Defendants.	)	
JOHN W. DECAMP, et al.,	)	**Case No. 4:04CV3194**
	)	
Plaintiffs,	)	
v.	)	
STATE OF NEBRASKA, et al.,	)	
	)	
Defendants.	)	

(Filed Sept. 30, 2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, Neil Oxton, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am a resident of Lincoln, Nebraska. I have lived in Nebraska since 1968.

3. I was formerly an employee of the Farmers Union, either of the national office or of the state office.

4. On January I, 1978, I became President of Farmers Union of Nebraska, and at all times relevant herein I held that position.

5. Farmers Union of Nebraska is a general farm organization composed of Nebraska farmers, some of whom work land owned by corporations in which they have controlling interest.

6. For the past thirty years, I have held the belief that the workers of farm and ranch land should enjoy the rights and responsibilities inherent in the ownership of the land and that the separation of land and ownership from the person working the land creates social and economic evils.

7. Because of that belief, I have stood in opposition during the past thirty years to corporate ownership of farm and ranch land, unless the corporation be one in which the majority of voting stock is held by the farm or ranch families working the land.

8. I label the former land-owning corporation as the "non-family corporation" and the latter land-owning corporation as the "family-farm corporation".

9. Since 1968, I have actively supported legislation to restrict non-family corporate ownership and operation of Nebraska farm and ranch land.

10. I have attended no less than twelve public hearings before Committees of the Nebraska Legislature taking testimony on bills to restrict non-family corporate ownership and operation of Nebraska farm and ranch land.

11. I have heard individuals testify in support of such proposed legislation.

12. I myself have testified in support of such legislation.

13. Following is a statement I made in 1979 to the Constitutional Revision and Recreation Committee of the Nebraska Legislature on LB 191, 1979 Session, to place before the voters a proposed constitutional amendment to restrict in Nebraska non-family corporate ownership and operation of farm and ranch land:

> "Farmers Union joins other farm organizations in coming before the Constitutional Revision and Recreation Committee of the Nebraska Legislature to ask protection from the economic power of corporate investments and the threat it poses to Nebraska farmers. For years we have been denied legislation, with legislators killing such restrictions. We are told that corporation farming is no problem in Nebraska. This after the poultry industry has been lost, while cattle feeding is moving from family feeders to large incorporated custom feed lots, as hogs are moving to the factory, and while increasing acres of land are drifting to corporate control. We've been told that this legislation would restrict the right of family farmers to incorporate. This is simply not true. The law would clearly exempt family farm corporations using a broad definition. We've been told the legislation we offer is unconstitutional. Meanwhile, other states with nearly identical constitutions have enacted nearly identical prohibitions of corporate farming, prohibitions which have been upheld by state and federal courts. We have been told that this legislation is a violation of free enterprise and that its passage

will sacrifice efficiency, but this law seeks to preserve free enterprise, the system of many independent units. One percent of the nation's feed lots, two-thirds of the nation's fat cattle. Where are our many cattle feeders? Other states have a problem now with large custom feeders, and Nebraska will inherit this problem too if we don't take steps to prevent it now. What is happening to the right of opportunity for those who are willing to work hard? What opportunity will exist to farmers in future years when the rest of agriculture comes under corporate control? Where is the efficiency we are told would be lost if we outlawed corporation farming? In the report, *Another Look at Economics of Size in Cattle Feeding*, USDA economist Ralph Johnson, located right here in Lincoln, tells us that the very large custom feed lots are no more economical producers than smaller family feeders. In the study of economics of size in swine production under different production methods and phases, Iowa State University researches found little cost advantages in large hog factories, even when using an unrealistically large litter size of over 10 pigs per sow. A South Dakota State University study showed feeding hogs in confinement, a growing challenge for corporate investments in Nebraska, yield slower rate of gain, than much more elaborate systems, so it is clearly not efficiency that is fueling the trend to large corporate farm operations but rather economic and political power. The trend to absentee ownership of land is being brought about not by efficiency in using hired help to operate a farm but by economic power of a corporation to command large amounts of money and credit needed to buy land today. Tax law allows investors in hog confinements to recover over half their investments the

> first year in tax savings. The federal tax laws are at the root of much of this trend and are the result of the political power and influence of the wealth of the corporations. This influence is the real reason that the farmers of Nebraska have for years been denied protection from corporate farming. The Legislature's refusal to pass this legislation is not in defense of incorporated family farms, the Constitution, free enterprise, or efficiency. It is in defense of corporate interests."

14. I cite the foregoing statement of mine to the Constitutional Revision and Recreation Committee of the Nebraska Legislature not for the truth of the facts set forth therein but rather as an expression of my belief that social and economic evils attended non-family corporate ownership and operation of Nebraska farm and ranch land.

15. In December 1981, the delegates to the annual convention of the Farmers Union of Nebraska voted to draft and circulate an initiative petition to place before the voters an amendment to the Nebraska Constitution to restrict non-family corporate ownership and operation of farm and ranch land in Nebraska.

16. Because of this decision and my position with Farmers Union of Nebraska, I assumed the leadership responsibility for the drafting of the initiative petition, the recruitment and training of petition circulators, and the acquisition of the requisite number of signers to the petition so that the issue would be placed on the November 1982 ballot.

17. In drafting the initiative petition, I worked with several individuals interested in restricting non-family

corporate ownership and operation of farm and ranch land in Nebraska.

18. We completed drafting the initiative petition in February 1982.

19. After the initiative petition was drafted, it was necessary to find people throughout the State of Nebraska who would circulate the initiative petition.

20. To that end, in addition to the Nebraska Farmer Union's organization, I sought support from other organizations in Nebraska for the names and addresses of people who might serve as circulators. Organizations and associations I contacted for help included the Nebraska Grange, the Nebraska chapter of the National Farm Organization, the Nebraska Woolgrowers Association, the Nebraska Wheat Growers Association, the Nebraska Association of Farmer Elected Committeemen, the Center for Rural Affairs, Catholic Rural Life Conference, Women Involved in Farm Economics, Nebraska Synod of the American Lutheran Church, and the Nebraska Conference of the United Methodist Church.

21. These organizations and associations arranged meetings throughout the State of Nebraska to be attended by members of the organizations and associations, as well as by other persons interested in restricting non-family corporate ownership and operation of Nebraska farm and ranch land.

22. I attended at least 75 such meetings between March and June 1982.

23. At the meetings I attended I explained my perceptions of the social economic evils inherent in non-family

corporate ownership and operation of Nebraska farm and ranch land.

24. Many persons in attendance expressed to me a similar belief.

25. As a result of the many meetings conducted in early 1982 throughout Nebraska, as set forth above, I located over 1,700 qualified Nebraska voters who agreed to circulate the initiative petition for signature by voters.

26. The initiative petition contained the following pertinent language:

> "The object of this initiative petition is to prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land and to prohibit further establishment of non-family corporate crop and livestock operations."
>
> . . .
>
> "___ being first duly sworn ___ deposes and says that he (she) is the circulator of the foregoing petition containing ___ signatures;
>
> . . .
>
> That the affiant stated to each petitioner before he affixed his signature the legal effect and nature of such petition."

27. So that each circulator could know the legal effect and nature of the petition, I explained at each of the aforesaid meetings the social and economic evils of non-family corporate ownership and operation of farm and ranchland in Nebraska that I believed the petition was designed to address and the legal effect and nature of the petition.

28. In June 1982, I submitted signed initiative petitions to the Secretary of State for the State of Nebraska containing 62,536 signatures. The Secretary of State determined that 56,636 qualified voters signed the petitions, certified the petition for the November 1982 ballot and denominated the same as Initiative 300.

29. During this time I heard hundreds of Nebraska residents express various social and economic evils they perceived to be created by the rise of non-family corporate ownership and operation of farm and ranch land in Nebraska.

30. Among the expressions I received were the following:

(a) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor;

(b) Increased absentee ownership of farm and ranch lands in Nebraska with such increase adversely affecting stewardship and preservation of soil, water, and other natural resources;

(c) Increased tenant operation of farms and ranches in Nebraska with such increase adversely affecting participation in local government and voluntary associational activity;

(d) Erosion of traditional agricultural cash markets through production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers;

(e) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations;

(f) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point or origin by non-family farm and ranch corporations;

(g) Ability of non-family farms and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

31. While I make no claims for the truth or falsity of aforesaid expressions of perceived social and economic evils attendant upon the rise of non-family corporate ownership and operation of Nebraska farm and ranch land, such expressions were made, and to the best of my knowledge, represented the beliefs of the speakers that social and economic evils were attendant upon the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska.

32. Based on my personal knowledge, from 1968 through 1982, hundreds of Nebraska residents and dozens of organizations or associations of Nebraska residents supported legislation in the Nebraska legislature to address perceived social and economic evils resulting from the ownership and operation of Nebraska farm and ranch land by non-family corporation.

33. Based on my personal knowledge, no fewer than ten organizations or associations of Nebraska residents and no fewer than 1700 Nebraska residents participated

in those initiating activities designed to place Initiative 300 on the ballot and gathered support form 56,636 qualified Nebraska voters to place Initiative 300 on the ballot.

34. Based on my personal knowledge, many of the foregoing initiated Initiative 300 to address perceived social and economic evils resulting from the ownership and operation of Nebraska farm and randh land by non-family corporations.

35. To my personal knowledge, either individually or in my capacity as President of Nebraska Farmers Union, Exhibits Nos. 1 through 13 attached hereto and incorporated herein by reference, are true and correct copies of documents used to analyze, review, prepare and/or promote Initiative 300.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28th day of September, 2005.

/s/ Neil Oxton
Neil Oxton

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,	)	**Case No. 8:04CV645**
Plaintiffs,	)	**DECLARATION OF GEORGE WILLIAM BURROWS**
v.	)	
JOHN GALE, et al.,	)	
Defendants.	)	

JOHN W. DECAMP, et al.,	)	**Case No. 4:04CV3194**
Plaintiffs,	)	
v.	)	
STATE OF NEBRASKA, et al.,	)	
Defendants.	)	

(Filed 9/30/2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, George William Burrows, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am a retired farmer and land owner in Gage County, Nebraska.

3. In 1974, I was elected from the 30th Legislative District to the Nebraska Legislature. I served as State

Senator in the Nebraska Legislature from 1975 through 1982.

4. In the early 1960's, I became concerned over what I thought to be a rise in ownership of Nebraska farm and ranch land by corporations.

5. In my view, corporate ownership of farm and ranch land divorced those persons working the land from the rights and responsibilities of ownership of the land.

6. I believed then and continue to believe today that the workers of farm and ranch land should enjoy the rights and responsibilities inherent in the ownership of the land and that the separation of land ownership from the persons working the land creates social and economic evils.

7. In the early 1960's, I knew that some farm and ranch families, including my own family, had formed corporations in which they held the majority of the stock, thereby retaining control of the corporations, and had deeded the farm or ranch land they were working to such corporations. I labeled this kind of corporation as the "family farm corporation".

8. I did not then believe and I do not believe today that any social and economic evils attended such form of land ownership because the individual who controlled the family farm corporation were actually working the land.

9. I believed in the early 1970's that some forms of farm and ranch operations, such as chicken production, were already controlled by non-family farm corporations.

10. I deplored this development, as I understood it to exist, and hoped no similar patterns would occur in other types of farming or ranching operations.

11. Because of my beliefs, I determined to use my power as a state legislator to propose legislation that would restrict non-family farm corporate ownership and operation of farm and ranch land in Nebraska.

12. To that end, during my eight years as a state senator, I prepared and introduced the following Bills in the Nebraska Legislature regarding non-family farm corporate ownership of farm and ranch land in Nebraska:

(i) LB 363, 1975, for an Act relating to agriculture; to declare intent; to define terms; to provide that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide penalties.

(ii) LB 857, 1978, for an Act relating to real property; to place certain restrictions on tax exempt pension, profit sharing, or stock bonus trusts as prescribed.

(iii) LB 190, 1979, for an Act relating to agriculture; to declare intent; to define terms; to provide that no corporations shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide penalties.

(iv) LB 191, 1979, for an Act for submission to the electors of an ammendment to Article XII of the Constitution of Nebraska, relating to miscellaneous corporations by adding thereto a new Section 8; to require the Legislature to restrict the ownership of land used for agriculture purposes; to

provide for the time and manner of submission and form of ballot; and to provide the effective date thereof.

(v) LB 837, 1980, for an Act relating to agriculture; to declare intent to define terms; to provided that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide for enforcement.

(vi) LB 184, 1981, for an Act related to agriculture; to declare intent; to define terms; to provide that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide for enforcement.

13. Each of the foregoing bills was subjected to a public hearing in the Legislature.

14. I attended the public hearing on each of the foregoing Bills.

15. Nebraska residents provided supportive testimony for each of the measures that I introduced to restrict corporate ownership of farm and ranch land in Nebraska. Each supportive witness stated that he or she perceived a social or economic evil attendant in the rise of non-family corporate ownership and operation of farm or ranch land in Nebraska.

16. Among the witnesses' expressions of social and economic evils they perceived to be created by the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska were the following:

(i) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the

non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor;

(ii) Increased absentee ownership of farm and ranch lands in Nebraska with such increase adversely affecting stewardship and preservation of soil, water, and other natural resources;

(iii) Increased tenant operation of farms and ranches in Nebraska with such increase adversely affecting participation in local government and voluntary associational activity;

(iv) Erosion of agricultural markets free of production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers;

(v) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations requiring fewer laborers to operate;

(vi) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point of origin by non-family farm and ranch corporations;

(vii) Ability of non-family farm and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

17. In addition, because of my continued advocacy of restrictions on non-family corporate ownership and operation of farm and ranch land in Nebraska I conversed with many Nebraska residents over my eight years as a state legislator about their perceptions of social and economic

evils attendant upon non-family corporate ownership and operation of farm and ranch land in Nebraska.

18. The individuals expressed to me their belief that non-family corporate ownership and operation of Nebraska farm and ranch land was fraught with social and economic evils for the state. Among their expressions of social and economic evils they perceived to be created by the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska were the same kinds of expressions that I have set forth in the preceding paragraph.

19. While I cannot vouch for the truth or falsity for the aforesaid expressions of perceived social and economic evils, such expression were made as stated and, to the best of my knowledge, represented the speakers' beliefs that social and economic evils attended the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska.

20. At no time during my tenure as a state senator did any of the foregoing bills addressing non-family corporate ownership and operation of farm and ranch land in Nebraska pass in the Nebraska Legislature.

21. During my eight years as a state senator, Attorney General Paul Douglas rendered to the Nebraska Legislature advisory opinions on legislation to restrict non-family corporate ownership and operation of farm and ranch land in Nebraska.

22. Regarding my last restrictive Bill, LB 184, 1981 Session, Douglas stated in pertinent part as follows:

> "This office has issued numerous opinions on bills nearly identical or similar to LB 184 over the past several years. *See, Report of the Attorney*

General 1971-1972, No. 86 at page 201 and No. 118 at page 275, *Report of the Attorney General, 1973-1974,* No. 116 at page 159, *Report of the Attorney General, 1975-1976,* No. 5 at page 5 and No. 40 at page 43, *Report of the Attorney General, 1977-1978,* No. 44 at page 62 and No. 172 at page 258. We have attached copies of two of the more recent of these opinions to this letter for you reference.

In all of the opinions cited above, this office has repeatedly stated that legislation similar or identical to LB 184 is of suspect constitutional validity. We have variously stated that this type of legislation involves an improper and invalid legislative classification of corporations, that this type of legislation involves an improper overextension of the Legislature's police power, and that this type of legislation is in contravention of Article XII, Section I, and Article III, Section 18 of the Nebraska Constitution pertaining to special laws. We have reviewed LB 184 in light of our various earlier opinions and we have determined that LB 184 raised the same constitutional concerns as we expressed earlier."

23. As I worked to obtain votes from my colleagues in the state legislature in support of my legislation to restrict non-family corporate ownership of farm and ranch land in Nebraska, some of my colleagues told me that they could not vote for the legislation because if was constitutionally suspect.

24. I do not vouch for the truth or falsity of the remarks nor of the opinions of Attorney General Paul Douglas, but the remarks were made and the opinions rendered.

25. In January 1982, I learned that the Nebraska Farmers Union was preparing an initiative petition to circulate among voters in Nebraska to place on the ballot a constitution amendment to restrict non-family farm corporate ownership and operation of Nebraska farm and ranch land.

26. Because I had been unsuccessful in the Legislature with both proposed legislation and a constitutional amendment, I concluded that the initiative route was the only avenue available to address the perceived social and economic evils attendant upon non-family corporate ownership and operation of farm and ranch land in Nebraska and that the initiative petition and the circulation thereof.

27. On September 15, 1982, the Legislature's Banking, Commerce and Insurance Committee conducted the only formal public hearing on Initiative 300.

28. I was the only proponent on Initiative 300 to speak at the public hearing on September 15, 1982.

29. I made the following statements to the Committee on September 15, 1982, of the perceived social and economic evils I saw Initiative 300 as addressing:

> "Whether we as a state want family farms as a choice, or whether we want to allow large corporations to buy the farm land in the State of Nebraska and turn it into perpetual concentrated ownership where the individual can no longer get it back. Most of our forefathers came into this country and many of them in the middle west to get away from European systems where a few large land owners owned things, where perpetually they count not get a piece of the action. A

part of the capitalism, capitalism that was referred to as ownership by the people, where they could have a piece of the action. This is true capitalism – corporations are different than individuals as they concentrate their purchase of land. They never die, and that ownership is perpetual."

"The historical evidence that the family farm operation is the most efficient for the consumer, the producer, whenever it is used, family farm operation, where there is incentive there to produce more. The only efficiency the large outside corporations have shown are those that are of economic power, monopolistic power to set their prices if they gain control of the product and possibly other powers in tax evasion and so forth, advantages which are detrimental to the people of the state."

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28 day of September, 2005.

/s/ George William Burrows
George William Burrows

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,	)	
	)	
Plaintiffs,	)	**Case No. 8:04CV645**
v.	)	**DECLARATION OF**
JOHN GALE, et al.,	)	**CHUCK HASSEBROOK**
	)	
Defendants.	)	
JOHN W. DECAMP, et al.,	)	**Case No. 4:04CV3194**
	)	
Plaintiffs,	)	
v.	)	
STATE OF NEBRASKA, et al.,	)	
	)	
Defendants.	)	

(Filed Sept. 30, 2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, Chuck Hassebrook, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am currently Executive Director for the Center for Rural Affairs, Inc.

3. The Center for Rural Affairs ("CFRA") is a private, non-profit organization incorporated under the laws of the

State of Nebraska. CFRA is headquartered in Lyons, Nebraska.

4. CRFA was founded in 1973 with a mission to establish strong rural communities, social and economic justice, environmental stewardship, and genuine opportunity for all while engaging people in decisions that affect the quality of their lives and the future of their communities.

5. In the years 1981 and 1982, I was on staff with the CFRA as a Field Organizer. At that time my duties included researching corporate farming, farm credit and farm taxation along with drafting policy and legislative proposals in those and other areas.

6. In the years 1981 and 1982, Drey Samuelson was on the staff of the Nebraska Farmers Union ("NFU"), a general farm organization, as an assistant to the president of NFU.

7. In late 1981 or early 1982, Drey Samuelson and I were asked by Neil Oxton, who at that time was President of NFU, to draft language for a proposed constitutional amendment to restrict corporate farming, which later became Initiative 300.

8. As I had a strong background in researching corporate farming in my position with CFRA, along with my knowledge of agricultural business structures, I played the lead role in drafting the language of Initiative 300.

9. A group of representatives from supportive organizations formed the Committee to Preserve the Family Farm ("Committee") to help guide our efforts in drafting Initiative 300. The Committee included representatives from such organizations as the NFU, CFRA, Women

Involved in Farm Economics ("WIFE"), and Nebraska Grange.

10. The Committee, along with Dr. James Lake, a constitutional law professor at the University of Nebraska College of Law, reviewed and commented on our drafts.

11. Dr. James Lake provided guidance on critical decisions in drafting the proposed language of Initiative 300.

12. As a starting point in the drafting of Initiative 300 we used LB 184, a 1981 legislative bill introduced by then State Senator Bill Burrows.

13. Extensive changes were made to the legislative bill that Senator Burrows introduced.

14. These changes were made based upon our knowledge of corporate farming and research of similar laws from other states.

15. During the drafting of Initiative 300, I relied upon my knowledge of corporate farming which I had gained, in part, from the research I completed when I helped draft the 1979 version of a series of CFRA reports entitled "Who Will Sit Up With the Corporate Sow?: A Report On Vertical Integration And Large Scale Hog Production In Nebraska" ("Corporate Sow").

16. The Corporate Sow reports are attached hereto and incorporated herein by reference as Attachment 22 and 23.

17. Corporate Sow concluded:

a. The percentage of Nebraska's pig crop farrowed in hog factories has tripled – increasing

from seven percent in 1974 to the 24% figure today (ie 1979).

b. Although many of the hog factories are still owned primarily by farmers, they are increasingly owned by non-farm investors and corporations involved in other farming operations. . . .

c. The largest current scheme to bring non-farm money into Nebraska hog confinement is apparently the brainchild of Sand Livestock Systems of Columbus, Nebraska – the nation's largest builder of hog confinement. Sand personnel and Columbus business people are the primary owners of at least four of five 480-sow farrowing complexes overlooking the Platte River Valley from it southern bluffs nea Shelby, Nebraska.

18. I also studied the 1976 Center for Rural Affairs report "Wheels of Fortune" ("WOF").

19. WOF is attached hereto and incorporated herein by reference as Attachment 20.

20. WOF documented that absentee and corporate investors owned over 25 percent of irrigated land in Holt County and nearly 30 percent of irrigated land in Dundy County. These investors and corporations included both Nebraskans and non-Nebraskans.

21. Of Holt County, the WOF report said, "The absentee owners are mainly Nebraskans primarily engaged in business pursuits other than farming."

22. Both reports, Corporate Sow and WOF, demonstrated our concern over growing control of agriculture by both Nebraska and non-Nebraska investors and corporations.

23. I also had extensive knowledge of other states' laws in effect at the time c the drafting of Initiative 300.

24. I had reviewed the United States Department of Agriculture's report "Stat Regulation of Corporate Farming" written by Thomas D Edmondson and Kenneth R. Kruse (Agricultural Economic Report No. 419, December 1978), which the CFRA had in its possession at the time we were drafting Initiative 300.

25. The "State Regulation of Corporate Farming" report is attached hereto and incorporated herein by reference as Attachment 21.

26. In drafting Initiative 300, I was determined to ensure that it would be effective – more effective than other states laws – against the growth in corporate farming by groups of investors such as we had documented in Nebraska.

27. In my experience and based on my personal knowledge, these investor corporations were very often Nebraska corporations with predominantly Nebraska stockholders.

28. I was determined that we write an amendment that would restrict these types of corporations.

29. My view was, and remains, that the corporate form of business was created by government to confer the advantages of limited liability and reduced taxes on certain businesses.

30. My intent was to limit the use of the corporate vehicle to the most socially beneficial form of farming: family farming, where the family that lives on or works the farm also owns and controls the operation.

31. Such restrictions are also beneficial because as persons laboring on the farm are family members, rather than members of another social class, management-labor relations can be expected to be more egalitarian and less exploitive and also because land is a family heirloom to be passed onto future generations, family members will be motivated to preserve it beyond rational economic planning horizons.

32. My intent in drafting Initiative 300 was to restrict use of the corporate vehicle by farm structures where ownership, labor and management were performed by different people, composing distinct social classes. To me, it made no difference whether such operations were owned by Columbus, Nebraska investors or New York, New York investors. My intent was to deny them the advantages conferred by government through the corporate form of business.

33. In my view, other states laws were ineffective in this regard because of their exemptions for authorized farm corporations – generally corporations owned by a limited number of stockholders.

34. Consequently, I struck the authorized farm corporation provision that was included in proposed legislation used as our starting point.

35. I had no interest in other variations of the authorized farm corporation.

36. Although some states, such as Kansas at that time, included an exemption for authorized farm corporations, the exemption only applied if all the incorporators were from that state, i.e. all the incorporators had to be from Kansas.

37. The use of such exemptions effectively targeted the restrictions at corporations controlled by out of state interests. ("State Regulation of Corporate Farming" (Agricultural Economic Report No. 419, December 1978). Therefore, we rejected that approach.

38. I was not interested in restricting only non-Nebraskans, so we included no language in the amendment to distinguish between Nebraska investors and investors from other states.

39. We also included no language to distinguish between Nebraska family farms and family farms based in other states. We did so consciously and intentionally.

40. As stated above, although I was one of the lead drafters of Initiative 300, decisions on these issues were shared among the Committee.

41. Each major decision about the drafting of the amendment was brought before the Committee and the Committee concurred with the decision to include no exemption for authorized farm corporations and make no distinction between Nebraska and non-Nebraska corporations or Nebraska and non-Nebraska investors.

42. The Committee was united in its determination and intent to prevent uninvolved investors from undermining the family farm structure of agriculture, irrespective of whether those investors lived in or out of Nebraska.

43. During the campaign for Initiative 300, I was a member of the circle of people developing strategy for the campaign – also including Neil Oxton, Marty Strange and Drey Samuelson.

44. From the outset, I anticipated that we would be heavily outspent by the opposition. Our strategy was to make an issue of corporate farming interests using their money to buy votes.

45. On the day spending reports were due to the Nebraska Accountability and Disclosure Commission, Drey Samuelson was literally sitting in the Commission lobby waiting for the spending and fundraising report of the opposition.

46. We were surprised and frankly elated to learn of the heavy dependence of the opposition on donations from large out of state interests, especially Prudential. That elevated our focus on out of state money in the campaign.

47. We believed that most voters would believe that Nebraska policy should be set by Nebraskans, rather than out of state companies pursuing their vested interests in the state.

48. Therefore, the closing weeks of the campaign included a focus on out of state interests buying votes, not because we were trying to discriminate against out of state commerce but rather, because we were drawing attention to an attempt by out of state interests to intervene in Nebraskans' decision.

49. Furthermore, I grew up at rural Platte Center Nebraska.

50. Plaintiff Terrence Schumacher is also a Platte Center native. Terrence's brother Tim Schumacher and his father Matt Schumacher live in Platte Center, at the center of Platte County, where some of the Schumacher family land is located.

51. The Schumacher farm is located within a few miles of the residence of Matt and Tim Schumacher.

52. To my personal knowledge, Exhibits Nos. 1 through 23, attached hereto and incorporated herein by reference, are true and correct copies of documents that I, and other individuals and organizations, used in researching how to draft Initiative 300 and documents that were used to analyze, review, prepare and/or promote Initiative 300.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28 day of September, 2005.

/s/ Chuck Hassebrook
Chuck Hassebrook

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(3)

No. 06-1045

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly found that the Respondents had standing to challenge article XII, § 8 of the Nebraska Constitution under the Dormant Commerce Clause?

2. Whether article XII, § 8 of the Nebraska Constitution discriminates against interstate commerce in violation of the Dormant Commerce Clause of the United States Constitution?

3. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly applied Nebraska law regarding the severability of unconstitutional enactments?

4. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly applied federal procedural law concerning summary judgment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The Petitioners are Nebraska Secretary of State John Gale, in his official capacity, and Nebraska Attorney General Jon Bruning, in his official capacity. The Respondents are Jim Jones; Terrence M. Schumacher; Shad Dahlgren; Harold Rickertsen; Todd Ehler; and Robert E. Beck III.

The Respondents are individuals and have no parent corporations.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 470 F.3d 1261 (8th Cir. 2006), and is reproduced in the Petitioners' Appendix at 1-18. The opinion of the United States District Court for the District of Nebraska is reported at 405 F. Supp. 2d 1066 (D. Neb. 2005), and is reproduced in the Petitioners' Appendix at 19-58.

STATEMENT OF THE CASE

On December 13, 2006, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Nebraska dated December 15, 2005, finding that article XII, § 8 of the Nebraska Constitution (known as "Initiative 300") violates the Commerce Clause of the United States Constitution. The Eighth Circuit found Initiative 300 to be unconstitutional as being both facially discriminatory against interstate commerce and as having been adopted with a discriminatory intent. *Jones v. Gale,* 470 F.3d 1261 (8th Cir. 2006). (Petitioners' Appendix at 16 (hereafter Pet. App.)).

The Respondents generally concur in the Petitioners' statement of the case with regard to the enactment of Initiative 300 and as to the description of the parties and litigation below.

SUMMARY OF THE ARGUMENT

The questions set forth by the Petitioners present no compelling basis for consideration by this Court and do not

merit review. It is undisputed that a nearly identical state constitutional provision was invalidated by the Eighth Circuit Court of Appeals in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), and that this Court denied certiorari in that case at 541 U.S. 1037 (2004). No Justices indicated dissent from the denial of certiorari. *Cf. South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, Circuit Justice, denying request for stay) ("The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari.").

Petitioners' questions one, three and four assert misapplication by the Eighth Circuit Court of Appeals of properly stated rules of law regarding standing, severability and summary judgment, respectively. Petitioners' second question concerning the constitutionality of Initiative 300 under the Dormant Commerce Clause also alleges misapplication of the law. No split exists among the Circuit Courts of Appeal as to the question presented, nor is there any conflict with a state court of last resort or any relevant decision of this Court. The Petitioners simply disagree with the Eighth Circuit's decision as to whether Initiative 300 discriminates against interstate commerce. Consequently, none of the questions presented merit review by this Court, and the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. Petitioners' First Question Asserts Only a Misapplication of a Properly Stated Rule of Law and Does Not Merit Review.

Pursuant to Supreme Court Rule 10 "[a] petition for a writ of certiorari will be granted only for compelling reasons." Petitioners' first question presents no compelling reason for review. It is merely a complaint that the United States District Court for the District of Nebraska and a unanimous panel of the Eighth Circuit Court of Appeals allegedly incorrectly determined that the Respondents had standing to challenge article XII, § 8 of the Nebraska Constitution as a violation of the Dormant Commerce Clause. The Petitioners assert the Eighth Circuit's holding "is contrary to the standard articulated by this Court for determining whether a party has standing to bring a Commerce Clause claim." (Pet. at 6) However, as Supreme Court Rule 10 notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Eighth Circuit, like the District Court below, carefully and thoroughly considered the standing of the Respondents, and correctly concluded the court had jurisdiction. (Pet. App. 28-35; Pet. App. 6-9) (applying *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)). The Petitioners repeatedly assail the standing of Respondents Schumacher and Beck. (Pet. 1, 8, 9) However, standing of the four other Respondents is not seriously questioned. Thus, even if the Court were to re-adjudicate the standing of two of the Respondents, there would be no change in the outcome of the case, as the lower courts would still be found to have had jurisdiction. *Bowan v. Kendrick*, 487 U.S. 589, 620 n.15 (1988). The Eighth

Circuit specifically noted this fact: "Although the district court concluded that all of the plaintiffs had standing to bring the commerce clause claim, we have said previously that 'where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial' to jurisdiction." (Pet. App. 6) (citations omitted). Thus, Petitioners' first question does not merit review.

II. Petitioners' Second Question Asks this Court to Review a Circuit Court Decision Where No Conflict Exists with Another Circuit Court or State Court of Last Resort or with any Relevant Decision of this Court.

The United States Court of Appeals for the Eighth Circuit, without dissent, held that article XII, § 8 of the Nebraska Constitution "discriminates against out-of-state entities both on its face and because of its discriminatory intent." (Pet. App. 15) Petitioners' second question asks this Court to review that conclusion. (Pet. 11)

While the Petitioners may certainly seek this Court's review of an alleged misapplication of the law, such is rarely the basis for granting a petition for writ of certiorari. (*See* Supreme Court Rule 10). This is especially true where, as here, there is no split among the Circuit Courts of Appeal as to the question presented, nor any conflict with a state court of last resort or any relevant decision of this Court. *Id.* The Petitioners simply disagree with the Eighth Circuit's decision as to whether the state law in question discriminates against interstate commence. The Petitioners also assert the novel argument that certiorari should be granted because the Eighth Circuit's decision in this case allegedly conflicts with an earlier Eighth Circuit decision. (Pet. 18) However, no *en banc* review was sought

by the Petitioners in the Circuit Court, and it cannot be presumed the Eighth Circuit is unmindful of its own decisions, especially those briefed, cited and discussed in this very case. (*See* Pet. App. 46)

Significantly, it is undisputed that a substantially identical state constitutional provision was invalidated by the Eighth Circuit Court of Appeals in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), and that this Court denied certiorari in that case at 541 U.S. 1037 (2004). No Justices indicated dissent from the denial of certiorari. *See South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, Circuit Justice) ("The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari."). Also noteworthy is the fact that on February 8, 2007, Justice Alito denied the Petitioners' application for a stay, apparently concluding the Petition herein fails to meet the applicable criteria. *See Edwards v. Hope Medical Group For Women*, 512 U.S. 1301, 1302 (1994) (Scalia, Circuit Justice, addressing a request for stay and setting forth the three criteria, including likelihood of review). Thus, question two presents no compelling reason for granting the Petition, and does not merit review.

III. Petitioners' Third Question Merely Asserts the Eighth Circuit Misapplied Nebraska Law Regarding Severability of Unconstitutional Provisions and Does Not Merit Review.

In their third question Petitioners seem to imply that a conflict exists between the Eighth Circuit and the Nebraska Supreme Court with regard to the law governing severability of unconstitutional provisions. (Pet. 19)

However, that is clearly not the case. The Eighth Circuit expressly acknowledged the applicability of Nebraska severability law, citing the same Nebraska cases as the Petitioners. (Pet. App. 17) The Eighth Circuit then applied this Nebraska law and concluded that "a severance would not satisfy the conditions that the Nebraska Supreme Court has outlined for a severance." (*Id.*) "We thus have no other option than to affirm the district court's judgment and hold that the entire amendment . . . is unconstitutional." (*Id.*)

Thus, Petitioners' third question presents nothing more than an assertion that the Eighth Circuit misapplied a properly stated rule of law, and does not merit review. (*See* Supreme Court Rule 10).

IV. Petitioners' Fourth Question Alleges Misapplication of the Standard for Disposition of a Case by Summary Judgment and Presents No Compelling Reason for Review.

In connection with its final question, the Petitioners assert "the Circuit Court misapplied this Court's summary judgment standard in ruling that this case could be decided on summary judgment." (Pet. 22) This argument is particularly novel in that, as the Eighth Circuit noted in its decision, "all parties moved for summary judgment." (Pet. App. 3) In addition, a substantially identical state constitutional provision was previously invalidated in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), *cert. denied*, 541 U.S. 1037 (2004). Thus, the Petitioners' assertion that the case was not appropriate for disposition by summary judgment is without merit. Furthermore, the Circuit Court has not "decided an important federal question in a way that

conflicts with relevant decisions of this Court." (Supreme Court Rule 10). Rather, the Petitioners once again merely assert a misapplication of a properly stated rule of law – in this instance the rules for summary judgment. Accordingly, Petitioners' question four does not merit review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 1st day of March, 2007.

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No. 06-1045

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES, TERRENCE M. SCHUMACHER, SHAD DAHLGREN, HAROLD G. RICKERTSEN, TODD EHLER, and ROBERT E. BECK III,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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INTEREST OF AMICI

This amici curiae brief is submitted pursuant to Rule 37(4) of the Supreme Court Rules by the States of Minnesota, Iowa, Missouri and North Dakota and the Commonwealth of Puerto Rico in support of the Petition For Writ Of Certiorari filed by John Gale and Jon Bruning in their respective capacities of Secretary of State and Attorney General of the State of Nebraska.

The Eighth Circuit Court of Appeals held that Nebraska's prohibition of corporate farming (called "Initiative 300"), adopted in 1982 by Nebraska voters as part of the Nebraska Constitution, is unconstitutional under the dormant Commerce Clause. *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006).

The Circuit Court's decision undercuts the principles of federalism by misapplying the Commerce Clause to negate the States' sovereign power to evenhandedly regulate local matters – corporate ownership and land use – to preserve family farms, rural economies, rural society, and the environment. The decision undoubtedly will be used to attack statutes of other states that similarly limit corporate farming.[1] More important, the decision is susceptible to broad application and thus imperils the power of the States to deal with serious economic, social and environmental problems generally. Finally, the decision below violates principles of federalism by unnecessarily striking down a provision of the Nebraska Constitution.

---

[1] *See*, e.g., Iowa Code ch. 9H; Kan. Stat. Ann. § 17-5901 et seq.; Minn. Stat. § 500.24 (2006); Mo. Ann. Stat. § 350.015; N.D. Cent. Code § 10-06.1-02; Okla. Const. Art. XXII, § 2; P.R. Const. Art. VI, § 14; S.D. Codified Laws ch. 47-9A; Wis. Stat. Ann. § 182.001.

The amici curiae States urge this Court to review the decision below because it strikes at the very heart of our federal system.

SUMMARY OF ARGUMENT

The Circuit Court decision improperly applied the Commerce Clause to limit State control over local matters: corporate land ownership and use. In doing so, it failed to honor the principles of federalism, failed to respect the States' significant interest in regulating corporate land ownership and use, and imperiled the ability of the States to deal with serious economic, social and environmental problems.

The decision further disregarded federalism by unnecessary striking down a provision of a State constitution. The decision below judicially inserted a restriction into a provision of the Nebraska Constitution, determined that the inserted restriction made the provision unconstitutional, and then struck down the entire provision.

This case presents the important issues of federalism and the power of the States to meet economic, social and environmental crises. It should be considered by this Court.

ARGUMENT

I. Federalism's Balance Between The States And The Federal Government Is Fundamental.

"Just as the separation and independence of the coordinate branches of the Federal Government serve to

prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *U.S. v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *Gregory*, 501 U.S. at 458).

Among those things protected by this division of authority is the sovereign power of each State to govern itself. This Court long ago recognized that a State has an important interest in regulating land use and can do so for the general welfare of its citizens and communities. *See*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (State can zone land use for the public health, safety, morals, and general welfare of its citizens). It has also recognized the power of the States to regulate corporate activity within their borders. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (State can prohibit petroleum producers and refiners from operating retail gas stations).

The decision of the Eighth Circuit directly and substantially infringes the fundamental right of the States to govern themselves and to govern the use of property and corporate activity within their borders. It is, therefore, critical that this Court hear this case.

II. Important, Nondiscriminatory State Interests Support State Laws Prohibiting Corporate Farming.

Agricultural states have a long history of regulating corporate farming. As early as 1945, this Court upheld the constitutionality of a North Dakota statute first enacted in 1932 that prohibited corporations from engaging in farming

and required them to dispose of any agricultural land they owned within ten years. *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945) (equal protection and due process challenge to disposition requirement).

The concern with the takeover of family farms by corporations is well-founded. The effects of corporate farming include larger operations, indifferent absentee ownership, monopolistic power, and economic, social, and environmental degradation. *See* U.S. Dept. of Agric., Nat'l Comm'n on Small Farms, *A Time to Act: A Report of the USDA National Commission on Small Farms* (1998) at 9, 22 (hereinafter USDA Comm'n on Small Farms); Richard F. Prim, *Minnesota's Anti-corporate Farm Statute Revisited: Competing Visions in Agriculture, and the Legislature's Recent Attempt to Empower Minnesota Livestock Farmers*, 18 Hamline L. Rev. 431, 442 (1995). Studies have shown that independent family farms contribute significantly more towards a healthy rural economy than do corporate farms. *See* Rick Welsh and Thomas A. Lyson, *Agricultural Industrialization, Anti-Corporate Farming Laws, and Rural Community Welfare*, 37 Environment & Planning A 1479, 1489 (2005). In addition, research indicates that as the number of independent family farms declines, the quality of rural life declines, available community services decrease, and the number of schools, churches, and other primary social institutions are reduced. *See* James B. Wadley, *Small Farms: The USDA, Rural Communities, and Urban Pressures*, 21 Washburn L. J. 478, 497 (1982). Further, cultural amenities, independent business establishments, and self-employment opportunities also decline. *Id.* A comparison of a family farm community with an agribusiness town led one expert to conclude:

> Whether we focus on economic, social, or political factors, the traditional virtues of our society are

> better served in the family farm community than in the agribusiness town. Incomes were on the average higher though more people were supported; business enterprises were both more numerous and more profitable; there were more social amenities such as parks, paved streets, and sewers; there were more schools, clubs, and churches; there were more local newspapers and formal institutions for local political decision-making. The crucial difference is that in the family farm community, most of the population was self-employed; in the other, two-thirds were agricultural workers.

Family Farm Antitrust Act of 1979: Hearings on S. 334 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 68 (1979) (statement of Walter Goldschmidt), *cited in*, *id.* at 499-500.[2]

The foregoing is reiterated in more graphic detail by the United States Department of Agriculture Commission on Small Farms:

> "As farm size and absentee ownership increase, social conditions in the local community deteriorate. We have found depressed median family incomes, high levels of poverty, low education levels, social and economic inequality between

[2] Additionally, experience in states allowing large corporate farming operations demonstrates that states have reason to be concerned with adverse environmental harm associated with such operations, including waste spills and water pollution. *See* Jan Stout, *The Missouri Anti-Corporate Farming Act: Reconciling the Interests of the Independent Farmer and the Corporate Farm*, 64 UMKC L. REV. 835, 848-50 (1996) (discussing the environmental harm experienced in Missouri and North Carolina resulting from large corporate hog farming operations).

> ethnic groups, etc. . . . associated with land and capital concentration in agriculture. . . . Communities that are surrounded by farms that are larger than can be operated by a family unit have a bi-modal income distribution, with a few wealthy elites, a majority of poor laborers, and virtually no middle class. The absence of a middle class at the community level has a serious negative effect on both the quality and quantity of social and commercial service, public education, local governments, etc."
>
> Owner-operated farm structures offer individual self-employment and business management opportunities . . . . [They] are more likely to have a stake in the well-being of the community and the well-being of its citizens. In turn, local land owners are more likely to be held accountable for any negative actions that harm the community.

USDA Comm'n on Small Farms at 13 (quoting in part Dean MacCannel, *Agribusiness and the Small Community, Background Paper to Technology, Public Policy and the Changing Structure of American Agriculture*, Office of Technology Assessment, U.S. Congress, Washington DC 1983.)

It is because of this impact that agricultural States have enacted laws limiting, in various ways, the role of corporate farming within their borders. Such laws have been acknowledged to be within the States' regulatory power. *See*, e.g., *Hampton Feedlot Inc. v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) ("The Missouri legislature has the authority to determine the course of its farming economy. . . ."); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805 (Mo. 1988) ("It is within the province of the legislature to enact a statute which regulates the

balance of competitive economic forces in the field of agricultural production and commerce, thereby protecting the welfare of its citizens comprising the traditional farming community. . . ."). State anti-corporate farming laws have consistently withstood challenges under the Equal Protection Clause, based on findings that such laws are rationally related to a state's legitimate interest in preventing corporate domination of farmland at the expense of independent family farms. *See*, e.g., *Asbury Hosp.*, 326 U.S. at 214 ("We cannot say that there are no differences between corporations generally and those falling into the excepted classes which may appropriately receive recognition in the legislative application of a state policy against the concentration of farming lands in corporate ownership."); *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991) (agreeing that a policy seeking to retain and promote family farm operations and avoid the threats of unrestricted corporate ownership of farmland by preventing the concentration of farmland in non-family corporations is a legitimate state interest under the equal protection clause); *Lehndorff Geneva, Inc.*, 744 S.W.2d at 806 ("The statute is rationally related to a legitimate state interest in that it prevents the aggregation of farmland in large corporations to the competitive exclusion of traditional farming entities.").

Moreover, Congress has expressly recognized the importance of preserving family farms and discouraging corporate farming. Codified in the Agriculture and Food Act is the congressional statement of policy supporting the maintenance of the family farm system of agriculture:

> Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress

> believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. *Congress further believes that any significant expansion of nonfamily owned large-scale corporate farming enterprises will be detrimental to the national welfare.*

7 U.S.C.A. § 2266(a) (1999) (emphasis added).

Limitations on corporate farming laws are not only supported by a long history of judicial and legislative recognition as to their legitimate purposes but also have had the effect of furthering those purposes. Specifically, the Welsh and Lyson study found that farming communities in states with anti-corporate farming laws have lower relative poverty levels, lower levels of unemployment, and higher percentages of farms reporting cash gains, than do farming communities in states without such laws. Welsh and Lyson, *supra*, at 1489.

States must continue to have the ability to limit corporate farming so that their rural areas do not become a society of corporate oligarchs and poor farm laborers.

III. The Circuit Court's Commerce Clause Analysis Failed To Properly Apply This Court's Controlling Precedent.

The Commerce Clause, although phrased as an affirmative grant of regulatory power to Congress, "has long been understood to have a 'negative' aspect that denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*,

511 U.S. 93, 98 (1994). The analysis to determine whether a state law violates this negative aspect of the Commerce Clause is well established. The first step is to determine whether the challenged law "'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" *Id.* 511 U.S. at 99 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). A nondiscriminatory law that has only incidental effects on interstate commerce is subject to a balancing test and will be upheld unless "'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). If the law discriminates against interstate commerce, the law is subject to more rigorous scrutiny and will be sustained only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

While the foregoing dichotomy is simply stated, "there is no clear line separating these categories. 'In either situation the critical consideration is the *overall* effect of the statute on *both local* and interstate activity.'" *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 402 (1994) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)) (emphasis added). Such critical consideration of both aspects of the law mitigates against usurpation by the federal courts of both the Congressional power to regulate commerce and the powers reserved to the States under our federal system and as expressed by the Tenth Amendment.

In this case, the Court of Appeals concluded that Nebraska's prohibition of corporate farming ("Initiative 300") discriminates against interstate commerce and held it '*per se* invalid' unless the [State] 'can demonstrate, under rigorous scrutiny, that [it has] no other means to advance a legitimate local interest.'" *Jones*, 470 F.3d at 1270. While the *amici curiae* States do not agree that the statute discriminates against interstate commerce or that rigorous scrutiny applies, this section addresses the Court of Appeal's failure to properly apply the rigorous scrutiny test set forth in this Court's controlling precedent.

In applying rigorous scrutiny, the Court of Appeals dismissed the significant land ownership, agricultural, and societal problems that Initiative 300 addresses and that are discussed in Part II of this brief. The Court of Appeals stated that it appeared that Nebraska was "attempting to obfuscate the issue by using such a vague definition of these 'negative effects' that the definition itself is what prevents us [the Court] from suggesting concrete alternative measures." *Id.* 470 F.3d at 1270. By thus dismissing the significant state interests in preventing the negative impacts of corporate farming, the Court of Appeals failed to consider "the *overall* effect of the statute on *both* local and interstate activity" which is the "critical consideration" under either rigorous scrutiny test or the balancing test. *C & A Carbone*, 511 U.S. at 402 (quoting *Brown-Forman Distillers Corp.* 476 U.S. at 579) (emphasis added). Further, having improperly dismissed the State interests, the court failed to consider that no other means addressed these important interests. The Court of Appeals thus failed to properly apply this Court's controlling precedent.

The failure of the Court of Appeals to properly apply the controlling precedent caused the court to incorrectly conclude that the Nebraska Constitution violates the dormant Commerce Clause and to improperly intrude upon an area reserved to the States.

IV. The Circuit Court's Interpretation And Invalidation Of The Nebraska Constitution Itself Violated Principles Of Federalism.

The Circuit Court's interpretation and invalidation of Nebraska's Constitution itself violated principles of federalism. The Circuit Court inserted a requirement in the Nebraska Constitution, and then, based upon the invalidity of the inserted restriction, struck down the entire constitutional provision. This violated two precepts of this Court and principles of federalism.

The Circuit Court inserted into Nebraska's Constitution the requirement that a family farm corporation shareholder must occupy *Nebraska* farmland to be excepted from the corporate farming prohibition. *Jones*, 470 F.3d at 1267-68. It did so based largely upon the legislative history of the provision, even though Nebraska's Constitution contains no such requirement and is facially neutral.

In doing this, the Circuit Court improperly disregarded the principle that if one construction of a statute would raise serious constitutional problems, while an alternative construction that does not is "fairly possible," the courts are obligated to construe the statute to avoid the constitutional problem. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). While this rule was stated in the context of judicial respect for a co-equal branch of government, principles of

federalism require no less when federal courts construe state law.

Second, the Circuit Court did not merely declare its own insertion invalid, but rather invalidated the entire Nebraska provision based upon the invalidity of the requirement that the Circuit Court inserted. In doing so the Circuit Court improperly disregarded the rule that when a state law is challenged on the basis of federal law, "state law is displaced only 'to the extent that it actually conflicts with federal law.'" *Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474, 476 (1996) (quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. and Dev. Comm'n*, 461 U.S. 190, 204 (1983)).

The Circuit Court's analysis is contrary to the precedents of this Court and the principles of federalism that those precedents preserve.

V. The Decision Below Improperly And Severely Limits The Ability Of The States To Regulate For the Public Health, Safety And Welfare.

The Circuit Court has determined that the dormant Commerce Clause invalidates state law without regard for the significant state interests furthered by that state law. Further, the Circuit Court adopted a method of statutory and constitutional analysis that resulted in the unnecessary invalidation of state law. These erroneous determinations are susceptible to broad application that will improperly and severely limit the ability of the States to regulate land use and corporate activity for the public health, safety and general welfare.

CONCLUSION

The decision of the Court of Appeals in this case failed to properly apply established dormant Commerce Clause jurisprudence and thus deprived the States of their sovereign power to govern land use and corporations within their own borders for the public good. Further, by disregarding rules of construction and restraint, the decision unnecessarily invalidated a state constitutional provision. The petition for writ of certiorari should be granted to consider these important issues of federalism.

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500.24 FARMING BY BUSINESS ORGANIZATIONS.

Subdivision 1. **Purpose.** The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.

Subd. 2. **Definitions.** The definitions in this subdivision apply to this section.

(a) "Farming" means the production of (1) agricultural products; (2) livestock or livestock products; (3) milk or milk products; or (4) fruit or other horticultural products. It does not include the processing, refining, or packaging of said products, nor the provision of spraying or harvesting services by a processor or distributor of farm products. It does not include the production of timber or forest products, the production of poultry or poultry products, or the feeding and caring for livestock that are delivered to a corporation for slaughter or processing for up to 20 days before slaughter or processing.

(b) "Family farm" means an unincorporated farming unit owned by one or more persons residing on the farm or actively engaging in farming.

(c) "Family farm corporation" means a corporation founded for the purpose of farming and the ownership of agricultural land in which the majority of the stock is held by and the majority of the stockholders are persons, the spouses of persons, or current beneficiaries of one or more family farm trusts in which the trustee holds stock in a family farm corporation, related to each other within the

third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are corporations; provided that a family farm corporation shall not cease to qualify as such hereunder by reason of any:

(1) transfer of shares of stock to a person or the spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the transfer, or to a family farm trust of which the shareholder, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of shares of stock to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the shareholder, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of the shares in the family farm corporation, and stock owned by a family farm trust are considered to be owned in equal shares by the current beneficiaries.

(d) "Family farm trust" means:

(1) a trust in which:

(i) a majority of the current beneficiaries are persons or spouses of persons who are related to each other within the third degree of kindred according to the rules of civil law;

(ii) all of the current beneficiaries are natural persons or nonprofit corporations or trusts described in the Internal Revenue Code, section 170(c), as amended, and the regulations under that section; and

(iii) one of the family member current beneficiaries is residing on or actively operating the farm; or the trust leases the agricultural land to a family farm unit, a family farm corporation, an authorized farm corporation, an authorized livestock farm corporation, a family farm limited liability company, a family farm trust, an authorized farm limited liability company, a family farm partnership, or an authorized farm partnership; or

(2) a charitable remainder trust as defined in the Internal Revenue Code, section 664, as amended, and the regulations under that section, and a charitable lead trust as set forth in the Internal Revenue Code, section 170(f), and the regulations under that section.

(e) "Authorized farm corporation" means a corporation meeting the following standards:

(1) it has no more than five shareholders, provided that for the purposes of this section, a husband and wife are considered one shareholder;

(2) all its shareholders, other than any estate, are natural persons or a family farm trust;

(3) it does not have more than one class of shares;

(4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;

(5) shareholders holding 51 percent or more of the interest in the corporation reside on the farm or are actively engaging in farming;

(6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and

(7) none of its shareholders are shareholders in other authorized farm corporations that directly or indirectly in combination with the corporation own more than 1,500 acres of agricultural land.

(f) "Authorized livestock farm corporation" means a corporation formed for the production of livestock and meeting the following standards:

(1) it is engaged in the production of livestock other than dairy cattle;

(2) all its shareholders, other than any estate, are natural persons, family farm trusts, or family farm corporations;

(3) it does not have more than one class of shares;

(4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;

(5) shareholders holding 75 percent or more of the control, financial, and capital investment in the corporation are farmers, and at least 51 percent of the required percentage of farmers are actively engaged in livestock production;

(6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and

(7) none of its shareholders are shareholders in other authorized farm corporations that directly or indirectly in combination with the corporation own more than 1,500 acres of agricultural land.

(g) "Agricultural land" means real estate used for farming or capable of being used for farming in this state.

(h) "Pension or investment fund" means a pension or employee welfare benefit fund, however organized, a mutual fund, a life insurance company separate account, a common trust of a bank or other trustee established for the investment and reinvestment of money contributed to it, a real estate investment trust, or an investment company as defined in United States Code, title 15, section 80a-3.

(i) "Farm homestead" means a house including adjoining buildings that has been used as part of a farming operation or is part of the agricultural land used for a farming operation.

(j) "Family farm partnership" means a limited partnership formed for the purpose of farming and the ownership of agricultural land in which the majority of the interests in the partnership is held by and the majority of the partners are natural persons or current beneficiaries of one or more family farm trusts in which the trustee holds an interest in a family farm partnership related to each other within the third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on the farm, actively operating the farm,

or the agricultural land was owned by one or more of the related persons for a period of five years before its transfer to the limited partnership, and none of the partners is a corporation. A family farm partnership does not cease to qualify as a family farm partnership because of a:

(1) transfer of a partnership interest to a person or spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the transfer or to a family farm trust of which the partner, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of a partnership interest to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the partner, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of a partnership interest in the family farm partnership, and interest owned by a family farm trust is considered to be owned in equal shares by the current beneficiaries.

(k) "Authorized farm partnership" means a limited partnership meeting the following standards:

(1) it has been issued a certificate from the secretary of state or is registered with the county recorder and farming and ownership of agricultural land is stated as a purpose or character of the business;

(2) it has no more than five partners;

(3) all its partners, other than any estate, are natural persons or family farm trusts;

(4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;

(5) its general partners hold at least 51 percent of the interest in the land assets of the partnership and reside on the farm or are actively engaging in farming not more than 1,500 acres as a general partner in an authorized limited partnership;

(6) its limited partners do not participate in the business of the limited partnership including operating, managing, or directing management of farming operations;

(7) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and

(8) none of its limited partners are limited partners in other authorized farm partnerships that directly or indirectly in combination with the partnership own more than 1,500 acres of agricultural land.

(l) "Family farm limited liability company" means a limited liability company founded for the purpose of farming and the ownership of agricultural land in which the majority of the membership interests is held by and the majority of the members are natural persons, or current beneficiaries of one or more family farm trusts in which the trustee holds an interest in a family farm limited liability company related to each other within the third degree of kindred according to the rules of the civil law, and at least one of the related persons is residing on the farm, actively operating the farm, or the agricultural

land was owned by one or more of the related persons for a period of five years before its transfer to the limited liability company, and none of the members is a corporation or a limited liability company. A family farm limited liability company does not cease to qualify as a family farm limited liability company because of:

(1) a transfer of a membership interest to a person or spouse of a person related within the third degree of kindred according to the rules of civil law to the person making the transfer or to a family farm trust of which the member, spouse, or related person is a current beneficiary; or

(2) distribution from a family farm trust of a membership interest to a beneficiary related within the third degree of kindred according to the rules of civil law to a majority of the current beneficiaries of the trust, or to a family farm trust of which the member, spouse, or related person is a current beneficiary.

For the purposes of this section, a transfer may be made with or without consideration, either directly or indirectly, during life or at death, whether or not in trust, of a membership interest in the family farm limited liability company, and interest owned by a family farm trust is considered to be owned in equal shares by the current beneficiaries. Except for a state or federally chartered financial institution acquiring an encumbrance for the purpose of security or an interest under paragraph (x), a member of a family farm limited liability company may not transfer a membership interest, including a financial interest, to a person who is not otherwise eligible to be a member under this paragraph.

(m) "Authorized farm limited liability company" means a limited liability company meeting the following standards:

(1) it has no more than five members;

(2) all its members, other than any estate, are natural persons or family farm trusts;

(3) it does not have more than one class of membership interests;

(4) its revenue from rent, royalties, dividends, interest, and annuities does not exceed 20 percent of its gross receipts;

(5) members holding 51 percent or more of both the governance rights and financial rights in the limited liability company reside on the farm or are actively engaged in farming;

(6) it does not, directly or indirectly, own or otherwise have an interest in any title to more than 1,500 acres of agricultural land; and

(7) none of its members are members in other authorized farm limited liability companies that directly or indirectly in combination with the authorized farm limited liability company own more than 1,500 acres of agricultural land.

Except for a state or federally chartered financial institution acquiring an encumbrance for the purpose of security or an interest under paragraph (x), a member of an authorized farm limited liability company may not transfer a membership interest, including a financial interest, to a person who is not otherwise eligible to be a member under this paragraph.

(n) "Farmer" means a natural person who regularly participates in physical labor or operations management in the person's farming operation and files "Schedule F" as part of the person's annual Form 1040 filing with the United States Internal Revenue Service.

(o) "Actively engaged in livestock production" means performing day-to-day physical labor or day-to-day operations management that significantly contributes to livestock production and the functioning of a livestock operation.

(p) "Research or experimental farm" means a corporation, limited partnership, pension, investment fund, or limited liability company that owns or operates agricultural land for research or experimental purposes, provided that any commercial sales from the operation are incidental to the research or experimental objectives of the corporation. A corporation, limited partnership, limited liability company, or pension or investment fund seeking initial approval by the commissioner to operate agricultural land for research or experimental purposes must first submit to the commissioner a prospectus or proposal of the intended method of operation containing information required by the commissioner including a copy of any operational contract with individual participants.

(q) "Breeding stock farm" means a corporation, limited partnership, or limited liability company, that owns or operates agricultural land for the purpose of raising breeding stock, including embryos, for resale to farmers or for the purpose of growing seed, wild rice, nursery plants, or sod. An entity that is organized to raise livestock other than dairy cattle under this paragraph that does not qualify as an authorized farm corporation must:

(1) sell all castrated animals to be fed out or finished to farming operations that are neither directly nor indirectly owned by the business entity operating the breeding stock operation; and

(2) report its total production and sales annually to the commissioner.

(r) "Aquatic farm" means a corporation, limited partnership, or limited liability company, that owns or leases agricultural land as a necessary part of an aquatic farm as defined in section 17.47, subdivision 3.

(s) "Religious farm" means a corporation formed primarily for religious purposes whose sole income is derived from agriculture.

(t) "Utility corporation" means a corporation regulated under Minnesota Statutes 1974, chapter 216B, that owns agricultural land for purposes described in that chapter, or an electric generation or transmission cooperative that owns agricultural land for use in its business if the land is not used for farming except under lease to a family farm unit, a family farm corporation, a family farm trust, a family farm partnership, or a family farm limited liability company.

(u) "Development organization" means a corporation, limited partnership, limited liability company, or pension or investment fund that has an interest in agricultural land for which the corporation, limited partnership, limited liability company, or pension or investment fund has documented plans to use and subsequently uses the land within six years from the date of purchase for a specific nonfarming purpose, or if the land is zoned nonagricultural, or if the land is located within an incorporated

area. A corporation, limited partnership, limited liability company, or pension or investment fund may hold agricultural land in the amount necessary for its nonfarm business operation; provided, however, that pending the development of agricultural land for nonfarm purposes, the land may not be used for farming except under lease to a family farm unit, a family farm corporation, a family farm trust, an authorized farm corporation, an authorized livestock farm corporation, a family farm partnership, an authorized farm partnership, a family farm limited liability company, or an authorized farm limited liability company, or except when controlled through ownership, options, leaseholds, or other agreements by a corporation that has entered into an agreement with the United States under the New Community Act of 1968 (Title IV of the Housing and Urban Development Act of 1968, United States Code, title 42, sections 3901 to 3914) as amended, or a subsidiary or assign of such a corporation.

(v) "Exempt land" means agricultural land owned or leased by a corporation as of May 20, 1973, agricultural land owned or leased by a pension or investment fund as of May 12, 1981, agricultural land owned or leased by a limited partnership as of May 1, 1988, or agricultural land owned or leased by a trust as of the effective date of Laws 2000, chapter 477, including the normal expansion of that ownership at a rate not to exceed 20 percent of the amount of land owned as of May 20, 1973, for a corporation; May 12, 1981, for a pension or investment fund; May 1, 1988, for a limited partnership, or the effective date of Laws 2000, chapter 477, for a trust, measured in acres, in any five-year period, and including additional ownership reasonably necessary to meet the requirements of pollution control rules. A corporation, limited partnership, or

pension or investment fund that is eligible to own or lease agricultural land under this section prior to May 1997, or a corporation that is eligible to own or lease agricultural land as a benevolent trust under this section prior to the effective date of Laws 2000, chapter 477, may continue to own or lease agricultural land subject to the same conditions and limitations as previously allowed.

(w) "Gifted land" means agricultural land acquired as a gift, either by grant or devise, by an educational, religious, or charitable nonprofit corporation, limited partnership, limited liability company, or pension or investment fund if all land so acquired is disposed of within ten years after acquiring the title.

(x) "Repossessed land" means agricultural land acquired by a corporation, limited partnership, limited liability company, or pension or investment fund by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim on the land, whether created by mortgage or otherwise if all land so acquired is disposed of within five years after acquiring the title. The five-year limitation is a covenant running with the title to the land against any grantee, assignee, or successor of the pension or investment fund, corporation, limited partnership, or limited liability company. The land so acquired must not be used for farming during the five-year period, except under a lease to a family farm unit, a family farm corporation, a family farm trust, an authorized farm corporation, an authorized livestock farm corporation, a family farm partnership, an authorized farm partnership, a family farm limited liability company, or an authorized farm limited liability company. Notwithstanding the five-year divestiture requirement under this paragraph, a financial institution may continue to own the agricultural

land if the agricultural land is leased to the immediately preceding former owner, but must dispose of the agricultural land within ten years of acquiring the title. Livestock acquired by a pension or investment fund, corporation, limited partnership, or limited liability company in the collection of debts, or by a procedure for the enforcement of lien or claim on the livestock whether created by security agreement or otherwise after August 1, 1994, must be sold or disposed of within one full production cycle for the type of livestock acquired or 18 months after the livestock is acquired, whichever is earlier.

(y) "Commissioner" means the commissioner of agriculture.

(z) "Nonprofit corporation" means a nonprofit corporation organized under state nonprofit corporation or trust law or qualified for tax-exempt status under federal tax law that uses the land for a specific nonfarming purpose or leases the agricultural land to a family farm unit, a family farm corporation, an authorized farm corporation, an authorized livestock farm corporation, a family farm limited liability company, a family farm trust, an authorized farm limited liability company, a family farm partnership, or an authorized farm partnership.

(aa) "Current beneficiary" means a person who at any time during a year is entitled to, or at the discretion of any person may, receive a distribution from the income or principal of the trust. It does not include a distributee trust, other than a trust described in section 170(c) of the Internal Revenue Code, as amended, but does include the current beneficiaries of the distributee trust. It does not include a person in whose favor a power of appointment could be exercised until the holder of the power of

appointment actually exercises the power of appointment in that person's favor. It does not include a person who is entitled to receive a distribution only after a specified time or upon the occurrence of a specified event until the time or occurrence of the event. For the purposes of this section, a distributee trust is a current beneficiary of a family farm trust.

(bb) "De minimis" means that any corporation, pension or investment fund, limited liability company, or limited partnership that directly or indirectly owns, acquires, or otherwise obtains any interest in 40 acres or less of agricultural land and annually receives less than $150 per acre in gross revenue from rental or agricultural production.

Subd. 3. **Farming and ownership of agricultural land by corporations restricted.**

(a) No corporation, limited liability company, pension or investment fund, trust, or limited partnership shall engage in farming; nor shall any corporation, limited liability company, pension or investment fund, trust, or limited partnership, directly or indirectly, own, acquire, or otherwise obtain any interest, in agricultural land other than a bona fide encumbrance taken for purposes of security. This subdivision does not apply to general partnerships. This subdivision does not apply to any agricultural land, corporation, limited partnership, trust, limited liability company, or pension or investment fund that meet any of the definitions in subdivision 2, paragraphs (b) to (f), (j) to (m), (p) to (x), (z), and (bb), has a conservation plan prepared for the agricultural land, and reports as required under subdivision 4.

(b) A corporation, pension or investment fund, trust, limited liability company, or limited partnership that cannot meet any of the definitions in subdivision 2, paragraphs (b) to (f), (j) to (m), (p) to (x), (z), and (bb), may petition the commissioner for an exemption from this subdivision. The commissioner may issue an exemption if the entity meets the following criteria:

(1) the exemption would not contradict the purpose of this section; and

(2) the petitioning entity would not have a significant impact upon the agriculture industry and the economy.

The commissioner shall review annually each entity that is issued an exemption under this paragraph to ensure that the entity continues to meet the criteria in clauses (1) and (2). If an entity fails to meet the criteria, the commissioner shall withdraw the exemption and the entity is subject to enforcement proceedings under subdivision 5. The commissioner shall submit a report with a list of each entity that is issued an exemption under this paragraph to the chairs of the senate and house agricultural policy committees by October 1 of each year.

Subd. 3a. **Lease agreement; conservation practice protection clause.** A corporation, pension or investment fund, limited partnership, or limited liability company other than those meeting any of the definitions in subdivision 2, paragraphs (c) to (f) or (j) to (m), when leasing farm land to a family farm unit, a family farm corporation, a family farm trust, an authorized farm corporation, an authorized livestock farm corporation, a family farm partnership, an authorized farm partnership, a family farm limited liability company, or an authorized farm limited liability company, under provisions of subdi-

vision 2, paragraph (x), must include within the lease agreement a provision prohibiting intentional damage or destruction to a conservation practice on the agricultural land.

Subd. 3b. **Protection of conservation practices.** A corporation, pension or investment fund, or limited partnership, or limited liability company other than those meeting any of the definitions in subdivision 2, paragraphs (c) to (f) or (j) to (m), which, during the period of time it holds agricultural land under subdivision 2, paragraph (x), intentionally destroys a conservation practice as defined in section 103F.401, subdivision 3, to which the state has made a financial contribution, must pay the commissioner, for deposit in the general fund, an amount equal to the state's total contributions to that conservation practice plus interest from the time of investment in the conservation practice. Interest must be calculated at an annual percentage rate of 12 percent.

Subd. 4. **Reports.** (a) The chief executive officer of every pension or investment fund, corporation, limited partnership, limited liability company, or entity that is seeking to qualify for an exemption from the commissioner, and the trustee of a family farm trust that holds any interest in agricultural land or land used for the breeding, feeding, pasturing, growing, or raising of livestock, dairy or poultry, or products thereof, or land used for the production of agricultural crops or fruit or other horticultural products, other than a bona fide encumbrance taken for purposes of security, or which is engaged in farming or proposing to commence farming in this state after May 20, 1973, shall file with the commissioner a report containing the following information and documents:

(1) the name of the pension or investment fund, corporation, limited partnership, or limited liability company and its place of incorporation, certification, or registration;

(2) the address of the pension or investment plan headquarters or of the registered office of the corporation in this state, the name and address of its registered agent in this state and, in the case of a foreign corporation, limited partnership, or limited liability company, the address of its principal office in its place of incorporation, certification, or registration;

(3) the acreage and location listed by quarter-quarter section, township, and county of each lot or parcel of agricultural land or land used for the keeping or feeding of poultry in this state owned or leased by the pension or investment fund, limited partnership, corporation, or limited liability company;

(4) the names and addresses of the officers, administrators, directors, or trustees of the pension or investment fund, or of the officers, shareholders owning more than ten percent of the stock, including the percent of stock owned by each such shareholder, the members of the board of directors of the corporation, and the members of the limited liability company, and the general and limited partners and the percentage of interest in the partnership by each partner;

(5) the farm products which the pension or investment fund, limited partnership, corporation, or limited liability company produces or intends to produce on its agricultural land;

(6) with the first report, a copy of the title to the property where the farming operations are or will occur indicating the particular exception claimed under subdivision 3; and

(7) with the first or second report, a copy of the conservation plan proposed by the soil and water conservation district, and with subsequent reports a statement of whether the conservation plan was implemented.

The report of a corporation, trust, limited liability company, or partnership seeking to qualify hereunder as a family farm corporation, an authorized farm corporation, an authorized livestock farm corporation, a family farm partnership, an authorized farm partnership, a family farm limited liability company, an authorized farm limited liability company, or a family farm trust or under an exemption from the commissioner shall contain the following additional information: the number of shares, partnership interests, or governance and financial rights owned by persons or current beneficiaries of a family farm trust residing on the farm or actively engaged in farming, or their relatives within the third degree of kindred according to the rules of the civil law or their spouses; the name, address, and number of shares owned by each shareholder, partnership interests owned by each partner or governance and financial rights owned by each member, and a statement as to percentage of gross receipts of the corporation derived from rent, royalties, dividends, interest, and annuities. No pension or investment fund, limited partnership, corporation, or limited liability company shall commence farming in this state until the commissioner has inspected the report and certified that its proposed operations comply with the provisions of this section.

(b) Every pension or investment fund, limited partnership, trust, corporation, or limited liability company as described in paragraph (a) shall, prior to April 15 of each year, file with the commissioner a report containing the information required in paragraph (a), based on its operations in the preceding calendar year and its status at the end of the year. A pension or investment fund, limited partnership, corporation, or limited liability company that does not file the report by April 15 must pay a $500 civil penalty. The penalty is a lien on the land being farmed under subdivision 3 until the penalty is paid.

(c) The commissioner may, for good cause shown, issue a written waiver or reduction of the civil penalty for failure to make a timely filing of the annual report required by this subdivision. The waiver or reduction is final and conclusive with respect to the civil penalty, and may not be reopened or modified by an officer, employee, or agent of the state, except upon a showing of fraud or malfeasance or misrepresentation of a material fact. The report required under paragraph (b) must be completed prior to a reduction or waiver under this paragraph. The commissioner may enter into an agreement under this paragraph only once for each corporation or partnership.

(d) Failure to file a required report or the willful filing of false information is a gross misdemeanor.

Subd. 5. **Enforcement.** With reason to believe that a corporation, limited partnership, limited liability company, trust, or pension or investment fund is violating subdivision 3, the attorney general shall commence an action in the district court in which any agricultural lands relative to such violation are situated, or if situated in two or more counties, in any county in which a substantial part of the

lands are situated. The attorney general shall file for record with the county recorder or the registrar of titles of each county in which any portion of said lands are located a notice of the pendency of the action as provided in section 557.02. If the court finds that the lands in question are being held in violation of subdivision 3, it shall enter an order so declaring. The attorney general shall file for record any such order with the county recorder or the registrar of titles of each county in which any portion of said lands are located. Thereafter, the pension or investment fund, limited partnership, or corporation owning such land shall have a period of five years from the date of such order to divest itself of such lands. The aforementioned five-year limitation period shall be deemed a covenant running with the title to the land against any pension or investment fund, limited partnership, or corporate grantee or assignee or the successor of such pension or investment fund, limited partnership, or corporation. Any lands not so divested within the time prescribed shall be sold at public sale in the manner prescribed by law for the foreclosure of a mortgage by action. In addition, any prospective or threatened violation may be enjoined by an action brought by the attorney general in the manner provided by law.

Subd. 6. [Renumbered 500.245, subdivision 1]

Subd. 7. [Renumbered 500.245, subdivision 2]

Subd. 8. [Renumbered 500.245, subdivision 3]

MOTION FILED

MAR 1 - 2007

(4)

No. 06-1045

In the Supreme Court of the United States

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL FARMERS UNION, NATIONAL FAMILY FARM COALITION, AND 40 OTHER ORGANIZATIONS IN SUPPORT OF PETITIONERS

(Additional *Amici* Listed on Inside Cover)

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ADDITIONAL *AMICI CURIAE*

American Corn Growers Association

Campaign for Family Farms and the Environment

Center for Rural Affairs

Federation of Southern Cooperatives

Great Plains Environmental Law Center

Institute for Agriculture and Trade Policy

Western Organization of Resource Councils

American Corn Growers Association of Nebraska

Arkansas Farmers Union

California Farmers Union

Citizens Action Coalition of Indiana

Dakota Resource Council

Dakota Rural Action

Farms Without Harm

Friends of the Constitution

Illinois Farmers Union

Illinois Stewardship Alliance

Indiana Farmers Union

Iowa Farmers Union

Kansas Farmers Union

Land Stewardship Project

Michigan Farmers Union

Minnesota Farmers Union

Missouri Farmers Union

Missouri Rural Crisis Center

Montana Farmers Union

Nebraska Environmental Action Coalition

Nebraska Farmers Union

Nebraska Grange

Nebraska Women In Farm Economics

North Dakota Farmers Union

Ohio Farmers Union

Pennsylvania Farmers Union

Powder River Basin Resource Council

Rocky Mountain Farmers Union

South Dakota Farmers Union

Texas Farmers Union

Utah Farmers Union

Washington Farmers Union

Wisconsin Farmers Union

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, National Farmers Union, National Family Farm Coalition, American Corn Growers Association, Campaign for Family Farms and the Environment, Center for Rural Affairs, Federation of Southern Cooperatives, Great Plains Environmental Law Center, Institute for Agriculture and Trade Policy, Western Organization of Resource Councils, American Corn Growers Association of Nebraska, Arkansas Farmers Union, California Farmers Union, Citizens Action Coalition of Indiana, Dakota Resource Council, Dakota Rural Action, Farms Without Harm, Friends of the Constitution, Illinois Farmers Union, Illinois Stewardship Alliance, Indiana Farmers Union, Iowa Farmers Union, Kansas Farmers Union, Land Stewardship Project, Michigan Farmers Union, Minnesota Farmers Union, Missouri Farmers Union, Missouri Rural Crisis Center, Montana Farmers Union, Nebraska Environmental Action Coalition, Nebraska Farmers Union, Nebraska Grange, Nebraska Women In Farm Economics, North Dakota Farmers Union, Ohio Farmers Union, Pennsylvania Farmers Union, Powder River Basin Resource Council, Rocky Mountain Farmers Union, South Dakota Farmers Union, Texas Farmers Union, Utah Farmers Union, Washington Farmers Union, and Wisconsin Farmers Union (collectively, "*Amici Curiae*") respectfully move for leave to file the accompanying brief as *Amici Curiae* in support of the Petition for Writ of Certiorari filed by Petitioners the Nebraska Secretary of State and Attorney General. Counsel for Respondents have not consented to the filing of this *amici curiae* brief, necessitating this motion.

Amici Curiae represent 42 rural and farmer-based organizations, representing hundreds of thousands of members, who have advocated for many years for the strengthening of family farms and rural communities. *Amici Curiae* write separately to emphasize the broad importance of this case. The

Eighth Circuit Court of Appeals struck down Nebraska's constitutional amendment, known as "Initiative 300" or "I-300," restricting corporations from farming or having an ownership interest in farmland. The Eighth Circuit's decision would leave vulnerable to dormant Commerce Clause challenge many other important state laws regulating corporate engagement in agriculture. *Amici Curiae* have worked to enact and protect state laws like I-300 that support family farmers; they therefore have an interest in supporting this Petition for Writ of Certiorari.

In light of the important issues being raised in this case, *Amici Curiae* respectfully request that their Motion for Leave to File Brief of *Amici Curiae* be granted.

Respectfully Submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae represent four national, five regional, and 33 state organizations that believe in, depend on, and actively work to support a family farm system of agriculture. Collectively, *Amici Curiae* represent well over a quarter of a million family farmers and tens of thousands of other members who are personally committed to preserving and creating a vibrant rural America. Each organization is described individually in the attached Appendix.

These organizations and their members know firsthand the benefits rural communities realize by supporting family-owned and -operated farms, and conversely the negative externalities caused by non-family-owned corporate investment in agriculture. All of these organizations support state laws, like the Nebraska constitutional provision at issue here, that regulate when and how non-family-based corporate entities may engage in agriculture.

The Eighth Circuit's decision to strike down Nebraska's voter-initiated law regulating which farm entities may use the benefit of a state-created limited liability shield undermines the family farm to the detriment of rural communities. The ability of states to promote and protect the health and well-being of struggling rural communities is of exceptional importance. If the decision below is not reversed, *Amici Curiae* are justifiably concerned it will open a floodgate to challenges to laws of other states—many of them also within the predominantly agricultural Eighth Circuit—that seek to promote the benefits of a family-farm system of agriculture. Therefore, *Amici Curiae* all have a vital interest in this Court granting the Petition for Writ of Certiorari and reversing the Eighth Circuit's decision.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Family-owned and -operated farms are the backbone of rural communities. Studies show that these family farms generate real and measurable benefits for their local communities. In contrast, academic and government studies regularly show that the health and well-being of rural communities decline as non-family-owned corporate entities shielded from personal liability take over farming operations: rural poverty increases, unemployment rates go up, civic participation declines, and children's health and welfare suffer.

In an effort to capture and promote the significant social welfare benefits derived from family-owned and -operated farms, states and citizens have enacted laws and constitutional amendments that, to varying degrees, regulate or restrict non-family-owned corporations' ability to own farmland and engage in farming. These laws do not implicate any *individual's* right to farm. Instead, these laws merely limit access to a state-created limited liability shield. Generally, these laws require that, in order to invoke the benefit of a liability-shielded business form, a farming entity must have some family connection to the land and at least one family member must maintain some direct connection to the farming operation. The logic is simple: When farmers have a direct allegiance to a particular farm and to its surrounding community, the risks of corporate ownership—where personal accountability to local residents and to the property does not necessarily exist—diminish or disappear.

Nebraska's constitutional amendment, known as "Initiative 300" or "I-300," was passed in 1982 by 56 percent of the voting public. For more than 30 years, I-300 has evenhandedly prohibited all limited liability entities from owning farm or ranch land, and from engaging in farming or ranching. Neb. Const. Art. XII, Sec. 8(1). I-300 provides an exception for family farm or ranch corporations "in which the majority of the voting stock is held by members of a family" and at least one family member "is a person residing on or actively engaged in the day to day labor and management of the

farm or ranch." *Id.* at Sec. 8(1)(A). Both in- and out-of-state family farm corporations may qualify for this exception equally. By emphasizing family ownership and direct family involvement in the farming operation, I-300 is precisely tailored to capture the proven social, environmental, and economic benefits of family-owned and -operated farming, and these important benefits far outweigh any incidental burden placed on interstate commerce.

The Eighth Circuit held I-300 discriminates against interstate commerce and invalidated it on the basis of the dormant Commerce Clause. *See Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). *Amici Curiae* now ask this Court to grant the Nebraska officials' Petition for Writ of Certiorari, and to reverse the Eighth Circuit, thereby returning rationality to dormant Commerce Clause jurisprudence and providing certainty for state governments and citizens seeking to preserve and promote the benefits of family farming.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision places in doubt a host of state laws that, like I-300, regulate how and when corporations can invest in local agriculture. Geographically, the Eighth Circuit encompasses the heartland of American agriculture. Therefore, it is not surprising that other state laws that similarly regulate the forms of business entities that may engage in agriculture are concentrated within the Eighth Circuit, and no other Circuit has had—or is likely to have—an opportunity to review these important state regulations on a dormant Commerce Clause basis. Therefore, review by this Court is warranted and needed at this time.

In addition, the Eighth Circuit's decision implicates an issue of tremendous national importance: what the future of rural America will look like and what tools the states will be left with to determine that future. Social science supports the conclusion that permitting owners who are not personally connected to the farm to access liability-shielded business

entities adversely affects the health and welfare of whole rural communities. Conversely, family-owned and -operated farms provide a wide range of positive benefits to the social fabric of rural life. The Eighth Circuit's decision deprives states of their long-recognized ability to regulate to support family farms, putting the entire landscape of rural America at risk. Immediate review of the Eighth Circuit's decision is critical not only to clarify for states and citizens the scope of state authority, but also to preserve the vitality of a host of agriculture-dependent rural communities and the family farming way of life.

Finally, the particular method Nebraska has chosen to support family farms in I-300 is evenhanded and well conceived. I-300 is not discriminatory. It neutrally regulates the structure of business entities in agriculture, and it is not intended to advantage in-state interests as against out-of-state interests nor to create any barriers to interstate trade. I-300 addresses the particular act of farming or owning farmland within the state, and responds directly to the social welfare damage caused by unfettered corporate investment in agriculture by providing a narrow, carefully tailored exception for *any* corporation (whether in- or out-of-state) that maintains the social, environmental, health, and welfare benefits associated with a family-based structure of ownership and operation of farms and ranches. As such, I-300 is a core, non-discriminatory exercise of the state's police power.

I. The Decision Below Jeopardizes Similar State Laws Concentrated Within the Agricultural Eighth Circuit.

Based on convincing evidence that family farms are the most socially desirable form of agriculture, at least nine states have enacted laws that, to varying degrees, restrict non-family-owned corporations from engaging in farming or owning agricultural land. *See* Iowa Code §§ 9H.1, 9H.3 to 9H1.5, and 202B.101 to 202B.402; Kan. Stat. §§ 17-5902 to 17-5904; Minn. Stat. § 500.24; Mo. Rev. Stat. §§ 350.010 to 350.040; Neb. Const. Art. XII, Sec. 8(1); N.D. Cent. Code §§ 10-06.1-01

to 10.06.1-27; Okla. Const. Art. XXII § 2 and Okla. Stat. tit. 18, § 951; S.D. Codified Laws §§ 47-9A-1 to 47-9A-23;[2] and Wis. Stat. § 182.001. These states share a common concern about the effect liability-shielded farm entities have on rural communities and on agricultural properties within their boundaries, and recognize that family-owned and -operated farms are the foundation of the most sustainable and beneficial system of agriculture. These state laws, and other important state efforts to better the social welfare of rural communities, will be immediately at risk if the Eighth Circuit's decision is not reversed.

Because the vast majority of states that directly regulate business entities in agriculture are within the Eighth Circuit, this Petition presents a unique and important opportunity for this Court to address the constitutionality of these laws. The geography of the Eighth Circuit literally encompasses the agricultural center of this country. Naturally, most state efforts to regulate the structure of local agricultural activities and landholdings are therefore also within this Circuit. Thus, the Eighth Circuit's decision to strike down Nebraska's voter-enacted constitutional amendment on dormant Commerce Clause grounds casts a ripple of doubt on these laws and directly affects several states within the Eighth Circuit—

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[2] The Eighth Circuit previously struck down a voter-enacted South Dakota constitutional amendment, known as Amendment E, that regulated corporate engagement in agriculture. *See S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003). In *Hazeltine*, the Eighth Circuit looked only to evidence in the particular legislative history of Amendment E and found a discriminatory purpose there. *Id.* at 593. The court expressly elected not to consider any other prong of the dormant Commerce Clause analysis. *Id.* Therefore, the constitutionality of this legal mechanism itself—*i.e.*, the constitutionality of regulating certain farm entities' access to a limited liability shield—was not directly considered.

including Iowa, Minnesota, Missouri, North Dakota, and South Dakota.

Moreover, in addition to state laws, like those cited above, that directly regulate the form of business entities permitted in agriculture, the Eighth Circuit's decision calls into question state laws that require some form of direct local accountability as a condition of doing business in the state. The degree to which an in-state connection can be required is an open question in this Court's dormant Commerce Clause jurisprudence. Thus, the Eighth Circuit's decision could raise serious questions about any state and local regulations that single out absentee landlords, that provide fair housing exceptions for landlords who physically reside in the place where rental units are being offered, that require certain professionals to maintain a bona fide physical office space in a given area, or that require these same professionals to be physically present for mandatory continuing education courses. The tenor of the Eighth Circuit's decision also casts doubt on an array of state zoning laws that intentionally restrict who can do what where, so that the state can shape the development of its own landscape and manage the structures of its local markets.

These questions are particularly opportune in the farm context at issue here. Farming is, by definition, entirely about a direct and physical connection to the land. As Thomas Jefferson recognized from the time of our nation's founding, "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bonds." 5 The Writings of Thomas Jefferson 93 (Albert E. Bergh ed.) (1905). When farmers and farmland owners are no longer "cultivators of the earth," but instead become anonymous business entities shielded by legal limits on personal liability, states are justifiably concerned.

This same pragmatic reasoning has been adopted by the federal government, which makes active owner-operation of a family farm a condition of eligibility for the United States

Department of Agriculture (USDA) Farm Service Agency's real estate and operating loans, an important source of agricultural credit.[3] In addition, an entire chapter of the federal bankruptcy code is set aside for the benefit of family farmers who are actually "engaged in a farm operation." 11 U.S.C. §§ 101(18)(A), 1201-31. And USDA has implemented an internal policy to develop and support programs focusing on the needs of owner-operated small farms and to reflect this purpose in all of its service areas. USDA Departmental Regulation No. 9700-1 § 4(b), 5(c) ("Small Farms Policy") (Sept. 8, 1999).[4]

Moreover, in other contexts, this Court has consistently recognized the power of states to act to preserve and promote a family farm system of agriculture, which is itself a long part of our national heritage.[5] For example, in upholding a North

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[3] These federal real estate and operating loans for farmers are limited to (1) individuals who operate a family farm; (2) entities whose majority interest is held by persons related by blood or marriage with at least one owner operating a family farm; and (3) entities not controlled by persons related by blood or marriage where all owners and the entity itself operate a family farm. 7 C.F.R. § 762.120(i), (j); 7 C.F.R. § 1941.12(a)(5), (b)(5)-(6); 7 C.F.R. § 1943.12(a)(5), (b)(4)-(5) (2006). For these purposes, qualification as a "family farm" includes the requirements that the farm be directly managed by the individual borrower or entity owner responsible for its operation, and that "a substantial amount of the labor requirements for the farm enterprise" be provided by the individual borrower or the entity owner responsible for its operation, along with family members. 7 C.F.R. § 762.102, "Family Farm" (3), (4); 7 C.F.R. § 1941.4, "Family Farm" (c), (d); 7 C.F.R. § 1943.4, "Family Farm" (c), (d) (2006).

[4] *Available at* http://www.usda.gov/oce/smallfarm/sfpolicy.htm.

[5] Corporations, by contrast, are creatures of state law that were historically disfavored by the founders. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) (stating that "at first, the corporate privilege was granted sparingly; and only when

Dakota law requiring corporations to divest themselves of their agricultural land holdings within the state (with an exception for corporations that were predominantly owned by farmers residing on farmland), this Court has acknowledged the "*unqualified power* of the state to preclude [a corporation's entry] into the state." *Asbury Hospital v. Cass County*, 326 U.S. 207, 210-11 (1945) (rejecting Equal Protection and other constitutional challenges to state law) (emphasis added); *see also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (recognizing in a Takings case, "The Hawaii legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentration of property ownership in Hawaii—a legitimate public purpose."); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting in an Equal Protection case, "States are accorded wide latitude in the regulation of their local economies under their police powers.").

In cases where nondiscriminatory laws were challenged under the dormant Commerce Clause, this Court and other courts have found the state's interest in fostering family farms and rural communities outweighs any burdens placed on interstate commerce. *See, e.g., Parker v. Brown*, 317 U.S. 341, 362-63 (1943) (upholding California's raisin marketing order "because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities"); *Hampton Feed Lots v. Nixon*, 249 F.3d 814, 820 (8th Cir. 2001) (upholding against dormant Commerce Clause attack a Missouri price discrimination law that directly regulated the sale of livestock in

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the grant seemed necessary in order to procure for the community some benefit otherwise unattainable"); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479 (1977) (reaffirming again that "corporations are creatures of state law") (internal quotation omitted).

Missouri for out-of-state packers by recognizing state "authority to determine the course of its farming economy").[6]

Furthermore, this Court has emphatically rejected the "notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (upholding state law prohibiting vertical integration in the petroleum industry by prohibiting all petroleum producers and refiners from operating retail gas stations in Maryland even where all of the burden fell on out-of-state entities); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92-93 (1987).

Despite these strong lines of cases supporting a state's right to enact laws to support a family-owned and -operated farm structure of agriculture, the lack of an authoritative decision

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[6] A string of other court decisions have also found the states' important interest in the preservation of family farms as economic units sufficient to withstand other constitutional challenges, including where the challenged law regulated corporate entry into agriculture. *E.g., MSM Farms, Inc. v. Spire*, 927 F.2d 330, 335 (8th Cir. 1991) (denying Equal Protection challenge to I-300 based on citizens' "reasonable judgment that prohibiting non-family corporate farming serves the public interest in preserving an agriculture where families own and farm the land"); *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 429-431 (Neb. 2000) (rejecting Equal Protection Clause challenge to I-300 based on state's interest in "retaining and promoting family farm operations"); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805-06 (Mo. 1988) (rejecting Equal Protection challenge to Missouri's regulation of corporate investment in agriculture); *see also Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 860 (8th Cir. 2002) (recognizing in a Contracts Clause case the "unquestionably significant and legitimate" state interest in "serving the farmer and rural communities in South Dakota"); *Van Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 378 (8th Cir. 1997) (describing in an Equal Protection case "preserving the family farm system" as "a legitimate governmental purpose").

from this Court on the constitutionality of laws like I-300 has created significant confusion and uncertainty beyond just the Eighth Circuit's decision in this case. *See, e.g.*, Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 Drake J. Agric. L. 33, 34, 37 (2004) (describing problems associated with increasing consolidation and vertical integration in agriculture and noting obstacles caused by uncertainty of state authority to respond); Roger A. McEowen & Neil E. Harl, *South Dakota Amendment E Ruled Unconstitutional—Is There a Future for Legislative Involvement in Shaping the Structure of Agriculture?*, 37 Creighton L. Rev. 285, 302 (2004) (warning Eighth Circuit precedent "raises serious concerns about the analysis of future dormant Commerce Clause cases" and "could also have a chilling effect on further legislation impacting the future structure of agriculture"); *see also* Christy Anderson Brekken, *South Dakota Farm Bureau, Inc. v. Hazeltine: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 Law & Ineq. J. 347 (2004).

Although this Court has recognized its dormant Commerce Clause jurisprudence "has not always been easy to follow," *CTS Corp.*, 481 U.S. at 87, important issues are presented clearly by this case and are ripe for review. Efforts by states like Nebraska to regulate how and when a farm entity may legally shield its owners from personal liability are consistent with prior cases from this Court that have recognized both the importance of the state's interest in preserving family farms and the state's authority to evenhandedly regulate the structure of its local agricultural markets. Given the number of states that have adopted laws similar to I-300, especially within the Eighth Circuit, it is essential to the day-to-day functioning of state governments, and to the mission and work of citizen groups like the *Amici Curiae* represented in this brief, to have clear guidance from this Court.

II. State Laws Like Nebraska's Initiative 300 Are Critically Important to Capture the Proven Social Welfare Benefits of a Family Farm System of Agriculture.

Social science supports the conclusion that the corporate structure of farm entities is directly tied to the health and well-being of rural communities. Government and academic studies consistently demonstrate the broad range of social benefits associated with family-owned and -operated farms, and show how the health and welfare of rural communities seriously decline as corporate owners, shielded from personal liability and physically removed from farming, take over farm operations.[7]

This result is in large part common sense: For-profit corporations, by nature, are creatures of state law that are specifically designed to allocate capital in what is deemed the most "efficient," or profitable, manner without regard to communities, neighborhoods, and families. *See, e.g., Louis K.*

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[7] The term "family farms," as it is used here, refers to farms on which day-to-day labor and management are provided by the farmer and/or the farm family. "Industrial farms," by contrast, are non-family-based production units characterized by absentee corporate ownership and a division of labor among owners, managers, and other hired labor. *See, e.g.,* Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988).

Ownership structure is a key difference between family and industrial farms; however, the size of the farm is also often used as a proxy for distinguishing industrial farms from more traditional family farms. "When social scientists refer to 'industrialized' farms, they invariably are referring to both scale and organizational characteristics of the farm unit." Linda M. Lobao, *Industrialized Farming and Its Relationship to Community Well-Being: Report Prepared for the State of South Dakota, Office of Attorney General* 4 (January 2000), http://www.agribusinessaccountability.org/pdfs//270_Industrialized%20Farming.pdf (prepared for *South Dakota Farmers Bureau v. South Dakota* in the United States District Court for the District of South Dakota).

Liggett Co. v. Lee, 288 U.S. 517, 565-66 (1933) (Brandeis, J., dissenting). In contrast, family farms, and the families that operate them, strive for different goals: building sustainable rural communities, promoting responsible stewardship of soil, water, and other resources, and ensuring through family ownership that land can be farmed by future generations. *See, e.g.*, Marty Strange, *Family Farming: A New Economic Vision* 32-42 (1988).

In the 1940s, at the direction of the U.S. Senate, anthropologist Dr. Walter Goldschmidt undertook one of the earliest objective comparisons of the community impacts of family farms and industrial farms. Goldschmidt studied two rural California communities in which the structure and size of farms were different, but the total value of farm production was almost identical. Walter Goldschmidt, *As You Sow: Three Studies in the Social Consequences of Agribusiness* xxiv, 306-14 (2d ed. 1978). One community was characterized by large-scale farms extensively employing wage laborers while the other was characterized by smaller family-owned and -operated farms. *Id.* at 279-82, 316-20.

Goldschmidt concluded that residents of the community with larger, industrialized farms realized a lower standard of living and quality of life as compared to the residents of the community with smaller family farms. *Id.* at 282-84. Residents of the community dominated by industrial farms had lower levels of income and educational attainment. *Id.* Further, the fiscal and political structure of the community was controlled by the owners of those industrial farms, who did not live in the community and cared little about the quality and diversity of public services. *Id.* In contrast, Goldschmidt concluded that a greater concentration of independent family farmers created an economic structure with more evenly distributed incomes and a larger middle class. *Id.* These communities also had more comprehensive and better quality public services because the family farmers lived and worked in the same community and

took a strong interest in local government and the services it provided. *Id.*

Since Goldschmidt published his results, research continues to confirm the "detrimental effects of industrial farming on many indicators of community quality of life, particularly those involving the social fabric of communities." Linda M. Lobao, *Industrialized Farming and Its Relationship to Community Well-Being: Report Prepared for the State of South Dakota* 22(Jan. 2000), http://www.agribusinessaccountability.org/pdfs//270_Industrialized%20Farming.pdf (last visited Feb. 26, 2007) (summarizing 38 studies of industrial farming and community well-being); *see also* Curtis W. Stofferahn, *Industrialized Farming and Its Relationship to Community Well-Being: An Update of a 2000 Report by Linda Lobao* 19, 30 (Sept. 2006), http://www.und.nodak.edu/misc/ndrural/Lobao%20&%20Stofferahn.pdf (last visited Feb. 26, 2007) (reviewing 56 studies on the effect of industrialized farming on community well-being and concluding 82 percent of these studies found some level of detrimental effect resulting from industrialized farming); Linda M. Lobao, *Locality and Inequality: Farm and Industry Structure and Socioeconomic Conditions* 53-75 (1990); Thomas A. Lyson & Rick Welsh, *Agricultural Industrialization, Anticorporate Farming Laws, and Rural Community Welfare*, 37 Environment and Planning A:1479, 1481 (2005).

In particular, industrial farming leads to declines in local population, lower incomes and lower standards of living, lower numbers and quality of community services, lower community integration and greater psychological stress, and a less diverse economic base and higher unemployment." David J. Peters, Technical Paper P-0702-1, *Revisiting the Goldschmidt Hypothesis: The Effect of Economic Structure on Socioeconomic Conditions in the Rural Midwest* 4 (Mo. Econ.

Research and Info. Ctr., 2002);[8] *see also* Lyson & Welsh, *Agricultural Industrialization* at 1481. Industrial farming has also been shown to result in increased crime, increased social conflict, loss of democratic decision-making as industrial interests dominate local politics, decline in the number of churches and local retail units, and environmental consequences including ecosystem strains and increased environmental violations. Lobao, *Industrialized Farming* at 15-16. In locations near large industrial hog confinement structures in particular, neighbors also complain of health problems and declining property values. *Id.* at 16.[9]

In contrast, counties dominated by moderate-sized family farms "consistently have better socioeconomic well-being, including lower family poverty, higher median family income, lower unemployment, and lower infant mortality." *Id.* at 7. Greater concentrations of farm proprietorships—defined as unincorporated farms owned by an individual—also produce better health and socioeconomic conditions for children. Peters, *Revisiting the Goldschmidt Hypothesis* at 17, 21, 24. Children in counties dominated by more farm proprietorships, with fewer

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[8] *Available at* http://www.missourifarmersunion.org/conf03/goldschmidt03.pdf.

[9] Large industrial farms can also cause significant environmental damage to a state's soil, water, and natural resources. In addition to the sheer consequences of their size, industrial corporate farms' liability shield, and the fact that their investors are not themselves living in the local environment, combine to make these entities even more risky to the environment. Although this brief will not exhaust the arguments about the environmental degradation caused by industrial farming, additional information on this issue can be found in Mark Lawrence, *Studying the Impacts of Industrial Confined Animal Feeding Operations: A Review of the Literature* 10, http://www.kerrcenter.com/publications/hogodorreview.pdf (last visited Feb. 26, 2007).

community members employed in industrial agriculture, measured better on four tested indicators—the percent of children enrolled in free and reduced price lunch programs, low birth weight infants, births to teen females, and the high school drop out rate. *Id.* at 8.

Interestingly, this Peters study determined that concentration of similar non-farm unincorporated businesses did not have the same impact, indicating "it is not proprietorships in general that matters, but that there is something unique about the economic activity of farming." *Id.* at 24. Peters explained this by pointing to other studies that have found that

> in farm families there is a high degree of overlap between business, leisure and family life that is not found in other types of family business. Farming also differs in that it is much more than an economic activity, but is a lifestyle rooted in certain values regarding the family and the land.

Id. The priority placed on intergenerational farm succession in many farm families also helps explain this phenomenon. *Id.*

Family farms also produce more employment than their industrial counterparts. One study revealed that large-scale hog farms displace about three times the number of independent hog farmers than they create in jobs. *See* John E. Ikerd, *The Economic Impacts of Increased Contract Swine Production in Missouri: Another Viewpoint*, http://www.ssu.missouri.edu/faculty/jikerd/papers/con-hog.htm (last visited Feb. 26, 2007). Studies have also confirmed that smaller operations make more of their purchases from local suppliers than do larger enterprises. Mark Lawrence, *Studying the Impacts of Industrial Confined Animal Feeding Operations: A Review of the Literature* 10, http://www.kerrcenter.com/publications/hogodorreview.pdf (last visited Feb. 26, 2007). Accordingly, rural development experts estimate that for every five to seven farms that go out of business, one business in the rural community closes. Osha Gray

Davidson, *Broken Heartland: The Rise of America's Rural Ghetto* 57 (1990).

The federal government has also recognized the importance of family farms to the general welfare of rural communities and to the overall health of our nation. The United States Department of Agriculture (USDA) has espoused a vision of American agriculture that focuses on "farms with less than $250,000 gross receipts annually, *on which day-to-day labor and management are provided by the farmer and/or the farm family* that owns the production or owns, or leases, the productive assets." *A Time to Act: A Report of the USDA National Commission on Small Farms* 28 (1998) (emphasis added).[10] As a shorthand, USDA refers to these farms as "small farms" but the requirement of direct and active management is essential, and the USDA has recognized family farms' benefits:

> Small farms contribute more than farm production to our society. Small farms embody a diversity of ownership, cropping systems, landscapes, biological organization, culture, and traditions. Since the majority of farmland is managed by a large number of small farm operators, the responsible management of soil, water, and wildlife encompassed by these farms produces significant environmental benefits. Decentralized land ownership produces more equitable economic opportunity for people in rural communities, and offers self-employment and business management opportunities. Farms, particularly family farms, can be nurturing places for children to grow up and acquire the values of responsibility and hard work.

Id. at 8.

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[10] *Available at* http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf.

Finally, studies show that state efforts "to discourage the development of a nonfamily-based corporate agriculture and to retain an agricultural industry that is dominated by family-owned, family-operated and family-controlled production units" are successful. Lyson & Welsh, *Agricultural Industrialization* at 1483, 1489-90. A comparison of agriculture-dependent counties in states with corporate farming laws, such as Nebraska, to those without such laws, reveals that the tested counties in states with corporate farm laws have fewer families in poverty, lower unemployment, and a higher percentage of farms realizing cash gains. Rick Welsh & Thomas A. Lyson, *Anti-Corporate Farming Laws, The "Goldschmidt Hypothesis" and Rural Community Welfare* 19-22, http://www.askfarmerbrown.org/welshlyson.pdf (last visited Feb. 26, 2007).

Thus, social science supports the logic of Nebraska's chosen distinction between family-owned corporate farm entities and non-family-owned corporate farm entities. The Eighth Circuit's decision deprives states of a long-held and important method of fostering healthy and viable rural communities. States must have the authority to regulate their local economies for the health and welfare of their citizens and communities. *See Dukes*, 427 U.S. at 303. Maintaining a family farm system of agriculture is critical for a range of social welfare indicators, and it is a proper role for states to act to capture and promote these benefits by regulating non-family-based corporate investment in agriculture. Given the significance of these issues for the future of American agriculture and, for that matter, all of rural America, it is essential that this Court accept review of this case and reverse the Eighth Circuit.

III. Initiative 300 Does Not Discriminate Against Interstate Commerce and Its Benefits Far Outweigh Any Incidental Burden.

A. Initiative 300 Is an Evenhanded Regulation.

I-300 is blind to the citizenship of its regulated parties, and permits both in- and out-of-state citizens to own farmland and to engage in farming as long as they meet the same neutral criteria. Because out-of-state corporations are treated the same as in-state corporations, there can be no discrimination. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). I-300 treats all parties equally by prohibiting *all* limited liability entities from owning farmland or engaging in farming—regardless of the place of incorporation and regardless of the investors' citizenship or residency. The existence of an exception for family farm or ranch corporations does not make I-300 discriminatory because, as Nebraska has made clear, both in- and out-of-state corporations may qualify for the family farm exception.

The fact that five of the six plaintiffs in this case are Nebraska residents underlines the conclusion that I-300 does not discriminate in favor of Nebraska residents. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) ("The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse."). I-300 applies equally to in-state residents and to entities incorporated in Nebraska. Nebraska corporations cannot engage in farming unless they too qualify as a family farm corporation, or meet one of the other neutral exceptions. Thus, a Nebraska corporation that is not majority-owned by a family, or in which no family member resides on or actively manages any portion of the corporate-owned farm, would be equally barred from owning farmland or engaging in farming in Nebraska.

This Court has held "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."

Exxon Corp., 437 U.S. at 126. Moreover, courts should "not invalidate a state statute . . . merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry." *Clover Leaf Creamery*, 449 U.S. at 463 n.7; *see also id.* at 471 n.15 (expressly applying this language to dormant Commerce Clause analysis). States clearly only have authority to regulate within their states, and their state police power authorities only go to their own citizens. Thus, it cannot be discrimination merely to attempt to regulate for the benefit of Nebraska's own rural communities, and this Court should grant this writ to avoid an unwanted acceleration of dormant Commerce Clause challenges to a host of traditional exercises of state police powers, particularly at this vulnerable time for the future of rural America.

B. The Benefits of Initiative 300 to Rural Welfare Far Outweigh Any Incidental and De Minimis Impact on Interstate Commerce.

Because I-300 is not discriminatory and is justified by a legitimate and recognized state interest, it is subject to the *Pike* balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Thus, the plaintiffs must prove that an actual burden exists upon interstate commerce and that the burden outweighs any putative local benefit to Nebraska rural communities. The burden in this case is slight at best. Out-of-state corporate interests can own and operate farms in Nebraska as long as they meet the same requirements that a Nebraska corporation must—that a member of the family owning a majority of the corporation reside on or provide the day-to-day labor or management on some portion of the corporate-owned farm. In addition, any individual or entity that maintains personal liability can farm or ranch in Nebraska regardless of citizenship or residency. Thus, the burden of I-300 on interstate commerce is, at most, de minimis.

In comparison, Nebraska's interest in maintaining the social, economic, and environmental health and welfare of its rural communities is significant. I-300 promotes Nebraska's

interest in preventing unrestricted corporate ownership of farm operations, and supporters of I-300 reasonably feared this type of absentee ownership "would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources." *MSM Farms, Inc.*, 927 F.2d at 333. In addition, as described in detail in Part II of this brief, studies consistently show that family farms are indeed better for rural communities, and that rural counties in states with corporate farm laws fare better in critical welfare measures. *E.g.,* Lobao, *Locality and Inequality* at 53-75; Welsh & Lyson, *Anti-Corporate Farming Laws* at 19-22.

The benefits of reducing poverty, unemployment, and social discord, while improving civic participation and children's health, clearly outweigh any burden placed on non-family farm corporations seeking to farm in Nebraska. Therefore, I-300 is constitutional, and the Eighth Circuit decision to the contrary must be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

1. The **National Farmers Union** (NFU), officially called the Farmers Educational and Cooperative Union of America, is a farm organization with a membership of nearly 250,000 farm and ranch families throughout the United States. NFU is a federation, with the presidents of the 23 state and one regional (covering three states) Farmers Union organizations serving as its board of directors. For more than 100 years, NFU's primary goal has been to sustain and strengthen family farm and ranch agriculture.

2. The **National Family Farm Coalition** (NFFC) represents 35 grassroots farm and rural advocacy organizations in more than 30 states. Formed in 1986, the coalition coordinates the efforts of a growing network of grassroots organizations committed to preserving and enhancing a family farm production system in the United States. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming.

3. **American Corn Growers Association** (ACGA) is America's leading progressive commodity association, representing the interests of corn producers in 35 states. Since its inception in 1987, the ACGA has worked tirelessly to enhance farm income and protect rural communities. ACGA members work together on economic, policy, and research issues affecting rural communities.

4. The **Campaign for Family Farms and the Environment** (CFFE) is an unincorporated association of family farm and community membership organizations including the Citizens Action Coalition of Indiana, Illinois Stewardship Alliance, Iowa Citizens for Community Improvement, Land Stewardship

Project, and Missouri Rural Crisis Center. CFFE and its members seek to develop and implement farm policies, farming practices, and marketing systems that help family farms and rural communities thrive. CFFE and its member organizations believe laws that restrict non-family-based corporations' involvement in farming are an important part of state policy supporting family farming.

5. The **Center for Rural Affairs** is a private, non-profit organization incorporated and operating in the State of Nebraska, which undertakes public policy advocacy, research, service, and educational work to support the independent and family farm and ranch system of agriculture. The Center for Rural Affairs is a proponent of Initiative 300 and assisted in the drafting of Initiative 300 and the petition drive to place Initiative 300 on the 1982 general election ballot.

6. The **Federation of Southern Cooperatives** (FSC) is a service, resource, and advocacy association for a constituency of 25,000 low-income families organized into over 100 cooperatives in rural communities across the South. An outgrowth of the Civil Rights Movement, one of FSC's mission areas is advocacy for public policy changes to assist family farmers and rural poor people to improve their lives and communities.

7. **Great Plains Environmental Law Center** (GPELC) is a nonprofit environmental law and advocacy organization located in Omaha, Nebraska. GPELC volunteers provide legal assistance to environmental organizations and family farm groups concerned with the negative environmental impact of corporate farming practices in the Great Plains Region.

8. The **Institute for Agriculture and Trade Policy** is a national non-profit organization that has worked for more than twenty years to support family farmers and promote sound agricultural policy. An on-farm ownership presence is at the heart of our mission.

9. **Western Organization of Resource Councils** (WORC) is a network of grassroots organizations from seven states that includes 9,500 members and 45 local community groups. WORC's seven state organizations are: Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), Oregon Rural Action (Oregon), the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress (Colorado). WORC's mission is to advance the vision of a democratic, sustainable, and just society through community action.

10. The **American Corn Growers of Nebraska** is the state chapter of ACGA. The ACGA of Nebraska is an active supporter of continued viability and enforcement of Initiative 300.

11. **Arkansas Farmers Union** (AFU) is a non-profit membership-based organization with approximately 13,900 members. AFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities.

12. **California Farmers Union** (CFU) works to promote the well-being of rural California and specifically supports California family farmers. CFU serves its membership by presenting the organization's policies to lawmakers at the local, state, and national level. CFU also assists with the development of farmer-owned cooperatives.

13. Founded in 1974, **Citizens Action Coalition of Indiana** (CAC) is a non-profit coalition of organizations with more than 250,000 individual members throughout Indiana. For over two decades, CAC has worked to empower citizens and promote economic and environmental justice, including promotion of family-farm-based agriculture.

14. **Dakota Resource Council** (DRC) is a grassroots organization formed in 1978 to protect North Dakota's natural

resources, rural communities, and agricultural economy. DRC is working for preservation of family farms, enforcement of corporate farming laws, protection of groundwater and clean air, and renewable energy.

15. **Dakota Rural Action** (DRA) is a grassroots family agriculture and conservation group that organizes South Dakotans to protect family farmers and ranchers and main street businesses while preserving natural resources, a clean environment, and a unique rural way of life. Formed in 1987, DRA makes supporting a family-based system of agriculture a top priority.

16. **Farms Without Harm** is a non-profit network of concerned citizens and small farmers that support safe, sustainable farming in Michigan. Farms Without Harm educates legislators and the public about the negative impact of factory farms on health, the environment, the local economy, and animal welfare.

17. **Friends of the Constitution** is a 21-member coalition that has existed since the adoption of Initiative 300 with the sole purpose of defending and enforcing Initiative 300. Its members are: American Corn Growers Association, Citizens for Air, Resources and Environment, Center for Rural Affairs, Custer County Sustainable Agriculture Society, League of Rural Voters, Mid-Nebraska PRIDE, Nebraska Appleseed Center for Law in the Public Interest, Nebraska Catholic Conference, Nebraska Chapter–Sierra Club, Nebraska Grange, Nebraska Lutheran Advocacy, Nebraska Farmers Organization, Nebraska Farmers Union, Nebraska Sustainable Agriculture Society, Nebraska Wildlife Federation, Nebraska–Worth Fighting For, Nebraskans for Peace, Northeast Nebraska Ag Support Group, Saunders County Livestock, Save Our Rural Resources, and Women Involved in Farm Economics.

18. **Illinois Farmers Union** (ILFU) is a non-profit advocacy group representing family farmers across the state of Illinois.

ILFU has more than 700 members statewide. Founded in 1954, ILFU is committed to providing effective grassroots leadership to build a sustainable economic system in which family farms and rural communities thrive and prosper. ILFU has worked to preserve Illinois's restrictions on corporate ownership of farmland and livestock.

19. The **Illinois Stewardship Alliance** (ISA) is a membership organization founded in 1974 as the Illinois South Project. ISA is a citizens' organization that promotes a safe and nutritious food system, family farming, and healthy communities by advocating diverse, humane, socially just, and ecologically sustainable production and marketing practices.

20. **Indiana Farmers Union** (INFU) is a producer-driven membership organization with approximately 750 members. INFU's primary goal is to sustain family farms and strengthen rural Indiana. INFU supports passage of a law regulating corporate-owned farms in Indiana and nationally.

21. **Iowa Farmers Union** (IFU) is a non-profit advocacy group representing family farmers across the state of Iowa. IFU's mission is to promote a viable system of sustainable agriculture and a high quality of life in rural communities. IFU supports and has worked to preserve Iowa's restrictions on corporate ownership of farmland and livestock.

22. **Kansas Farmers Union** (KFU) is a non-profit membership-based organization with approximately 9,000 members, a significant number of whom are Kansas farmers. Founded in 1907, KFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. KFU policy supports legislation similar to Nebraska's corporate farm law in Kansas.

23. The **Land Stewardship Project** (LSP) is a membership organization founded in 1982 and based in Minnesota. LSP's mission is to foster an ethic of stewardship for farmland, promote sustainable agriculture, and develop sustainable

communities. Hundreds of LSP's members are family farmers, and farming is an important element of the economies and environment of Minnesota's rural communities where these members live. LSP supports and has worked to preserve Minnesota's corporate farming law.

24. **Michigan Farmers Union** (MIFU) is a statewide family farm and rural advocacy organization. Established in 1932, MIFU is dedicated to strengthening the family farm system. Its policies are designed to reaffirm the family farm structure as the primary agricultural system and to assure rural and urban stability, the preservation of human and natural resources, and the dignity of the individual and family.

25. **Minnesota Farmers Union** (MFU) is a non-profit membership-based organization with approximately 23,400 members, about 95 percent of whom are Minnesota farmers. Founded in 1929, MFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. MFU has lobbied at the Minnesota legislature to protect Minnesota's corporate farming law, Minn. Stat. § 500.24.

26. **Missouri Farmers Union** (MOFU) is a non-profit membership-based organization with approximately 1,500 members, all of whom are Missouri farmers. Founded in 1999, MOFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers in rural communities. MOFU has been active in lobbying for family farmers and ranchers and has encouraged the passage of a stricter Missouri corporate farming law.

27. The **Missouri Rural Crisis Center** (MRCC) is a non-profit organization founded in 1985 by Missouri farmers and rural citizens, with more than 5,500 member families statewide today. MRCC's mission is to preserve family farms, promote stewardship of the land and environmental integrity, and strive for justice among diverse groups, both rural and urban.

28. The **Montana Farmers Union** (MTFU) is a non-profit membership-based organization with approximately 1,850 members, about 95 percent of whom are Montana farmers. Established in 1916, MTFU is organized to serve the interests of Montana farm and ranch families, along with rural communities, through the principles of education, legislation, and cooperation for economic prosperity and quality of life for all Montanans.

29. **Nebraska Environmental Action Coalition** (NEAC), a non-partisan, non-profit organization, is a statewide affiliation of individuals and organizations whose goal is the protection and preservation of Nebraska's natural heritage—its air, water, soil, and beauty—by addressing environmental and sustainability concerns in both its agricultural systems and urban infrastructure.

30. **Nebraska Farmers Union** (NEFU) is the second largest general farm organization in the State of Nebraska, and has been, and continues to be, dedicated to protecting and enhancing the economic well-being and quality of life of family farmers and ranchers and their rural communities. NEFU was actively involved in drafting Initiative 300, organizing the petition drive to place Initiative 300 on the 1982 general election ballot, and otherwise advocating for Initiative 300.

31. The **Nebraska Grange** is the state chapter of the National Grange, the nation's oldest national agricultural organization. The Nebraska Grange provides service to agricultural and rural areas on a wide variety of issues, designed to assure a strong and viable rural America. The Nebraska Grange was a proponent of Initiative 300 and assisted in advocating on behalf of Initiative 300 in the 1982 election.

32. **Nebraska Women Involved in Farm Economics** (WIFE) is an agricultural association organized in 1976 at Sidney, Nebraska. WIFE supports the family farm concept as the most efficient and reliable source for a secure food supply system. WIFE was a proponent of Initiative 300, assisting in drafting

Initiative 300, circulating petitions, and advocating for its passage.

33. Founded in 1927, **North Dakota Farmers Union** (NDFU) is a producer-controlled organization dedicated to serving its 37,000 North Dakota family members. NDFU believes that the family farm system of agriculture is the only way to ensure rural and urban stability, national prosperity, the preservation of human and natural resources, and the dignity of the individual and the family.

34. **Ohio Farmers Union** (OFU) is a non-partisan, non-profit advocacy group and service provider to a membership consisting of approximately 5,800 families. For 72 years, OFU has engaged in activities in Ohio with a goal of supporting and sustaining a family-farm-based system of agriculture. OFU's primary goal is to sustain and strengthen family farm and ranch agriculture. OFU supports the rights of communities to express their preferences in structuring their societies and supports legislation such as Nebraska's Initiative 300.

35. **Pennsylvania Farmers Union** (PFU) has approximately 1,400 members. PFU's mission includes supporting family-farm-based agriculture.

36. Founded in 1973, the **Powder River Basin Resource Council** is a grassroots organization of ranchers and landowners working to conserve Wyoming's natural resources and preserve and strengthen family ranches and farms to ensure a future for the state's small towns and rural economies. Powder River has more than 1,000 members, primarily in northeastern Wyoming.

37. **Rocky Mountain Farmers Union** (RMFU) represents approximately 23,000 family farm and ranch members in Colorado, New Mexico, and Wyoming. Founded in 1907, RMFU works to protect and enhance the economic interests and quality of life of family farmers and ranchers and the rural communities where they live.

38. **South Dakota Farmers Union** (SDFU) is a grassroots organization of about 10,000 members and has been the voice of South Dakota farm families for nearly a century. SDFU works as farmers' "hired hand" in the halls of state and federal government.

39. **Texas Farmers Union** promotes and protects the interests of family farmers and ranchers and others who live in rural communities, to inform and educate agricultural producers about their economic environment and about legislation which might affect their well-being.

40. **Utah Farmers Union**, a non-profit organization, was chartered in 1954 and currently has about 2,700 members. Its family farmer and rancher membership is concerned about corporate engagement in agriculture.

41. **Washington Farmers Union** (WAFU) is a state-based farm organization committed to the sustainability of family farming. WAFU's work includes efforts to support family farmers by achieving fair markets for farmers and addressing environmental issues in Washington state.

42. **Wisconsin Farmers Union** (WFU) is committed to enhancing the quality of life for family farmers, rural communities, and all people through educational opportunities, cooperative endeavors, and civic engagement. Chartered in 1930, WFU has a long history of advocacy on behalf of family farms and rural people, and is a strong proponent of Wis. Stat. Ann. § 182.001, which restricts corporate involvement in agriculture.